Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

22

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD & SCHULMAN LLP
One Pennsylvania Plaza
49th Floor
New York, New York 10119-0165
(212) 594-5300
Counsel for Respondents

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

August 25, 2006

(additional counsel listed on inside cover)

PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 6, 2006
CERTIORARI GRANTED: JUNE 26, 2006

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon
Communications Inc.
(successor-in-interest to
Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS
INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790

TIMOTHY BEYER
BROWNSTEIN HYATT
& FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest
Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly
SBC Communications Inc.)

JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East
Suite 400
Bala Cynwyd, Pennsylvania 19004
(610) 667-7706
Counsel for Respondents

TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States District Court for the Southern District of New York, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) 1

United States Court of Appeals for the Second Circuit, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 03-9213 6

Consolidated Amended Class Action Complaint, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed Apr. 11, 2003) 10

Exhibit A (map of RBOC Territories) 37

Exhibit B (map of Verizon Wireless Presence) 38

Declaration of Steven G. Bradbury, attached to Motion of Defendants Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and Verizon Communications Inc. To Dismiss the Consolidated Amended Complaint, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed May 12, 2003) (excerpt) 39

Exhibit D (Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002)) 41

Exhibit E (Jon Van, *Lawmakers Seek Probe of Bells*, Chicago Tribune (Dec. 19, 2002)) 44

Exhibit F (Letter from Rep. John Conyers and Rep. Zoe Lofgren to Hon. John D. Ashcroft, Attorney General (Dec. 18, 2002)) 46

Affidavit of Michael M. Buchman, attached to Opposition to BellSouth's Motion To Dismiss for Lack of Personal Jurisdiction and Improper Venue, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed June 20, 2003) (excerpt) 50

Exhibit A (148 Cong. Rec. H574-H575, H590-H591 (Feb. 27, 2002)) (excerpt) 54

Exhibit B (H.R. Rep. No. 107-83 (June 18, 2001)) (excerpt) 59

Exhibit C (Chris Nolter, *Taking the Local*, The Deal, June 2, 2003, at 22) 73

Exhibit D (Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002)) 41

Hearing Transcript, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. Aug. 1, 2003) (excerpt) 81

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
12/23/02	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 460132. (laq) (Entered: 12/27/2002)
		* * * * *
3/14/03	12	ORDER: case 03cv1567 (GEL) (as member case) shall be consolidated with 02cv10220 (GEL) (as lead case), this order shall be entered in 03cv1567 (GEL). No further filings shall be filed under 03cv1567 (GEL), without prior permission of the Court. (signed by Judge Gerard E. Lynch) (db) (Entered: 03/17/2003)

* * * * *

4/14/03	24	CONSOLIDATED AMENDED CLASS ACTION COMPLAINT by William Twombly (Plaintiffs) (Answer due 4/24/03 for Verizon Comm., for SBC Communication, for QWEST Communications, for BellSouth Corp., for Bell Atlantic) amending [1-1] complaint; Summons issued. (sb) (Entered: 04/23/2003)

* * * * *

5/12/03	32	NOTICE OF MOTION by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. to dismiss the Amended Complaint; Return Date not indicated (cd) (Entered: 05/14/2003)
5/12/03	33	DECLARATION of Steven G. Bradbury by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support Re: [32-1] motion to dismiss the Amended Complaint. (cd) (Entered: 05/14/2003)

* * * * *

5/12/03	36	MEMORANDUM OF LAW by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [32-1] motion to dismiss the Amended Complaint. (cd) (Entered: 05/14/2003)
5/19/03	39	NOTICE OF MOTION by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. for an order purs. to Rule 26(c) of the FRCP staying discovery. Return Date

5/29/03. Proposed order attached. (sb) (Entered: 05/22/2003)

5/19/03 40 MEMORANDUM OF LAW by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [39-1] motion for an order purs. to Rule 26(c) of the FRCP staying discovery. (sb) (Entered: 05/22/2003)

* * * * *

5/21/03 41 CERTIFICATION of Maria T. Galeno by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [39-1] motion for an order purs. to Rule 26(c) of the FRCP staying discovery. (sb) (Entered: 05/22/2003)

* * * * *

6/20/03 49 MEMORANDUM OF LAW by William Twombly in opposition to [32-1] motion to dismiss the Amended Complaint, [30-1] motion to dismiss the consolidated Amended Complaint. (rec'd in the night deposit box on 6/20/03 at 10:11 p.m.) (sac) (Entered: 06/24/2003)

* * * * *

6/20/03 51 AFFIDAVIT of Michael M. Buchman by William Twombly in support of [50-1] opposition memorandum, [49-1] opposition memorandum. (sac) (Entered: 06/24/2003)

* * * * *

6/30/03 53 REPLY MEMORANDUM by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support re: [30-1] motion to dis-

miss the consolidated Amended Complaint . (dle) (Entered: 07/07/2003)

* * * * *

10/7/03	57	Transcript of record of proceedings before Judge Gerard E. Lynch for the date(s) of 8/1/03. (df) (Entered: 10/07/2003)
10/8/03	58	OPINION AND ORDER #89177, granting [32-1] motion to dismiss the Amended Complaint, denying, as moot, [30-1] motion to dismiss the consolidated Amended Complaint. (signed by Judge Gerard E. Lynch); Sent to the Judgment Clerk. (kw) (Entered: 10/13/2003)
10/15/03	59	JUDGMENT, that for the reasons stated in the Court's Opinion (89177) and Order dated October 7, 2003, defendants' motion to dismiss the complaint is granted and defendant BellSouth's motion to dismiss for lack of personal jurisdiction is denied as moot. (signed by J. Michael McMahon, Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 10/16/03. (tp) (Entered: 10/16/2003)
10/15/03		Case closed. (tp) (Entered: 10/16/2003)
11/14/03	60	NOTICE OF APPEAL by William Twombly, Lawrence Marcus from [59-1] judgment order, [58-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Mayer, Brown, Rowe & Maw, LLP. (IN N.Y.), Bellsouth Corporation, Wilmer, Cutler & Pickering,Mayer (IN N.Y.), Brown, Rowe & Maw, LLP. (IN D.C.), Wilmer, Cutler & Pickering (IN D.C.), Kellogg, Huber, Hansen, Todd & Evans, L.L.C., Kirkland & Ellis, Pilsbury

		Withrop, LLP and Verizon Communications, Inc. $255.00 Appeal filing fee paid 11/14/03 on receipt # E 491366. (dt) (Entered: 11/14/2003)
		* * * * *
1/13/06	64	MANDATE of USCA (Certified Copy) as to [60] Notice of Appeal, filed by Lawrence Marcus, William Twombly, USCA Case Number 03-9213. It is hereby Ordered, Adjudged and Decreed that the judgment of said District Court be and it hereby is VACATED AND REMANDED in accordance with the opinion of this Court. Roseann B. MacKechnie, Clerk USCA. Issued As Mandate: 1/12/06. (dt,) (Entered: 01/19/2006)
1/19/06		Transmission of USCA Mandate/Order to the District Judge re: [64] USCA Mandate. (dt,) (Entered: 01/19/2006)
		* * * * *
7/5/06	100	ORDER: It is hereby ordered that all proceedings before this Court are stayed until the Supreme Court renders its decision. The pending motions to dismiss the case (Dkt. Nos. 73 and 75) are deemed withdrawn without prejudice to restoration to the Court's docket upon letter request by either party, upon completion of the proceedings before the Supreme Court. (Signed by Judge Gerard E. Lynch on 6/28/2006) (lb) (Entered: 07/06/2006)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9213

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
11/17/03	Copy of notice of appeal and district court docket entries on behalf of Appellant William Twombly, Appellant Lawrence Marcus filed. [03-9213] Form C due on 11/28/03. Form D due on 11/28/03. [DT]
11/17/03	Copy of district court judgment, dated 10/15/03, RECEIVED. [03-9213] [DT]
11/17/03	Copy of district court Opinion & Order, dated 10/7/03, RECEIVED. [03-9213] [DT]
* * * * *	
4/2/04	Record on appeal index in lieu of record filed. [JC]

4/12/04	APPELLANT Lawrence Marcus, William Twombly, brief FILED with proof of service. [JC]
4/12/04	APPELLANT Lawrence Marcus, William Twombly, joint appendix filed w/pfs. 2vols [JC]
4/12/04	Appellant APPELLANT Lawrence Marcus, William Twombly, special appendix filed (w/pfs) [JC]
* * * * *	
5/13/04	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, brief filed with proof of service. [JC]
5/26/04	APPELLANT Lawrence Marcus, William Twombly, reply brief filed with proof of service. [JC]
* * * * *	
9/15/04	Case heard before SACK, RAGGI, HALL, C.JJ CD DATE: 9/15/04 [RD]
9/27/04	Transcript of United States Court of Appeals oral argument dated 9/15/04 filed. [RD]
* * * * *	
12/14/04	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
1/31/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
2/3/05	APPELLEE SBC Communication, 28(J) letter received. [JC]
* * * * *	

3/3/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
3/10/05	Letter received from Mark C. Hansen, dated 3/8/05, in response to appellants 28(J) letter file 3/3/05 [JC]
3/22/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
3/28/05	Letter received from Mark C. Hansen, dated 3/25/05, in response to appellants 28(J) letter dated 3/22/05 [JC]
4/22/05	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, 28(J) letter received. [JC]
4/22/05	Letter in response to appellees 4/22/05 28(J) letter from APPELLANT Lawrence Marcus, William Twombly, received. [JC]
7/21/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
7/25/05	Letter received from Mark C. Hansen, dated 7/22/05 in response to appellants 7/21/05 28(J) letter. [JC]
8/2/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
8/4/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter FILED. [JC]
8/8/05	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, 28(J) letter received. [JC]
9/6/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]

9/8/05	Letter received from Mark C. Hansen, dated 9/7/05, in response to appellants 9/6/05 28(j) letter. [JC]
10/3/05	Judgment of the district court is VACATED & REMANDED by published signed opinion filed. (RDS) [JC]
10/3/05	Judgment filed. [JC]
10/3/05	Notice to counsel in re: Judgment filed 10/3/05 [JC]
* * * * *	
10/17/05	Appellee Verizon Communicatio, Appellee Bell Atlantic Corp. Petition for rehearing filed with proof of service. petition for rehearing en banc filed with proof of service. [JC]
* * * * *	
1/3/06	Order FILED DENYING motion petition for rehearing en banc by Appellee Verizon Communicatio, Appellee Bell Atlantic Corp., endorsed on motion dated 10/17/2005 [JC]
1/5/06	Notice to counsel in re: Order filed 1/3/06 denying petition for rehearing filed [JC]
1/12/06	Judgment MANDATE ISSUED. CLOSED [JC]
* * * * *	
1/24/06	Mandate receipt returned from the district court. [NS]
3/14/06	Notice of filing petition for APPELLEE Bell Atlantic Corp., Verizon Communicatio, dated 3/7/06 filed. Supreme Court #: 05-1126. [JC]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, by and through their undersigned attorneys, for their Amended Class Action Complaint allege the claims set forth herein. Plaintiffs' claims as to themselves and their own actions, as set forth in ¶¶ 9 and 10 are based upon their own knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel.

I.

NATURE OF THE ACTION

1. This lawsuit is brought as a class action on behalf of all individuals and entities who purchased local telephone and/or high speed internet services in the continental United States (excluding Alaska and Hawaii) from at least as early as February 8, 1996 and continuing to present (the "Class Period").

2. The Telecommunications Act of 1996, 47 U.S.C. §§ 151 to 614 (the "Act") was designed to promote competition for local telephone services by opening the markets to effective competition. The purpose, intent and requirements of the Act are to create competition without delay in the local telephone services markets so that the public's local telephone bills and charges will be reduced as soon as possible by virtue of such competition.

3. Local telephone services include traditional dial tone primarily used to make or receive voice, fax, or analog modem calls from a residence or business and exchange access services which allow long distance carriers to use their local exchange facilities to originate and terminate long distance calls to end users. Local telephone services also include, but is not limited to, custom calling services such as Caller ID, Call Waiting, Voice Mail and other advanced services. High speed internet services include circuits that connect customers to the internet at speeds in excess of 56K such as, but not limited to, T1 lines, asynchronous transfer mode circuits, frame relay circuits, ISDN, and digital subscriber lines ("DSL"). The rates concerning certain features or services are either not subject to tariff filing requirements and/or are not subject to any meaningful review.

4. Plaintiffs allege that Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

5. As a direct and proximate result of Defendants' unlawful contract, combination or conspiracy, Plaintiffs and members of the Class allege that Defendants have hindered the development of the local telephone and/or high speed internet services markets. Plaintiffs and members of the Class further allege that they have been and continue to be

denied the benefits of free and unrestrained competition for local telephone and/or high speed internet services. Plaintiffs and members of the Class have, therefore, been forced to pay supracompetitive prices for such services causing them to sustain injury to their business or property.

II.

JURISDICTION AND VENUE

6, Plaintiffs bring this class action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, to recover treble damages and injunctive relief as well as reasonable attorneys' fees and costs with respect to injuries arising from violations by Defendants of the federal antitrust laws, including Section 1 of the Sherman Act. 15 U.S.C. § 1.

7. The Court has federal question subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a) and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. The Court has supplemental jurisdiction over the state antitrust law claims pursuant to 28 U.S.C. § 1367.

8. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b)(2) because a part of the events or omissions giving rise to the claims occurred in this district, and pursuant to 28 U.S.C. § 1391(b)(3) and 15 U.S.C. §§ 15 and 22 because Defendants Bell Atlantic and Verizon have maintained or maintain a principal place of business within this district.

III.

PARTIES

9. Plaintiff William Twombly is a resident of Bethel, Connecticut. At times relevant herein, William Twombly was a resident of New York, New York and purchased local telephone and/or high speed internet services from Defendants Belt Atlantic Corporation or Verizon Communications, Inc.

10. Plaintiff Lawrence Marcus is a resident of Maple Glen, Pennsylvania. At times relevant herein, Lawrence Marcus purchased local telephone and/or high speed internet services from Defendants Bell Atlantic Corporation or Verizon Communications, Inc.

11. Defendant Bell Atlantic Corporation is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. Bell Atlantic Corporation is a telecommunications company with principal operating subsidiaries (together with the parent company "Bell Atlantic") that provide local telephone and/or high speed internet services to subscribers in Connecticut, Delaware, Maryland, Massachusetts, Maine, New Hampshire, New York, New Jersey, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia.

12. Defendant BellSouth Corporation is a Delaware corporation with its principal place of business at 1155 Peachtree Street, N.E., Atlanta, Georgia. BellSouth Corporation, is a telecommunications company that, through its wholly owned subsidiaries including but not limited to Bell South Telecommunications, Inc. (together with the parent company "BellSouth"), provides local telephone and/or high speed internet services to millions of subscribers in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee ("BellSouth").

13. Defendant Qwest Communications International, Inc., is a Delaware corporation with its principal place of business at 1801 California Street, Denver, Colorado. Qwest Communications International, Inc., is a telecommunications company that, through its wholly-owned subsidiaries including but not limited to Qwest Corporation, Inc (together with the parent company "Qwest"), provides local telephone and/or high speed internet services in fourteen states, including Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming ("Qwest").

14. Defendant SBC Communications, Inc., is a Delaware corporation with its principal place of business at 175 East Houston, San Antonio, Texas. SBC Communications, Inc., is a telecommunications company that, through its operating subsidiaries including but not limited to SBC Ameritech, SBC Nevada Bell, SBC Pacific Bell, SBC SNET and SBC Southwestern Bell (together with the parent company "SBC"), provides local telephone and/or high speed internet services to subscribers in Arkansas, California, Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas and Wisconsin.

15. Defendant Verizon Communications, Inc. ("Verizon") is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. GTE Corporation ("GTE") merged with and became a wholly-owned subsidiary of Bell Atlantic. Bell Atlantic now does business as Verizon Communications, Inc.

IV.

CO-CONSPIRATORS

16. Various other persons, firms, corporations and associations, not named in this Complaint, have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof.

V.

BACKGROUND

A. The Bell Operating System and Divestiture

17. During the early part of its approximately 120-year history, the telephone industry experienced varying periods of competition, monopolization and regulation. By 1934, the Bell System, consisting of Bell Operating Companies, along with American Telephone and Telegraph Company ("AT&T"), owned 80 percent of all the local telephone lines and services in the United States and owned a monopoly

long-distance network. The Bell Operating Companies were wholly-owned subsidiaries of AT&T.

18. In 1934, the Communications Act of 1934 was adopted. That act severed regulation of the telephone industry from the Interstate Commerce Commission and provided for the creation of the Federal Communications Commission ("FCC") to regulate interstate telephone, telegraph and radio companies. Interstate and international telephone services fell under the aegis of the FCC, and intrastate telephone services became regulated under the auspices of respective state commissions. Once a telephone communications service crossed a state line, it fell under the jurisdiction of the FCC.

19. In 1974, the United States filed a lawsuit against AT&T alleging that it had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus equipment and materials and supplies in violation of §§ 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 3. The basic theory of the government's case, as explained by the District Court, was that AT&T had unlawfully used its control of local exchange facilities to suppress competition in related markets, such as the markets for long distance services, which are dependent upon access to the local exchange to originate and terminate calls. *United States v. AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

20. In 1982, the United States and AT&T agreed to settle the case through the entry of a consent decree. In 1982, United States District Court Judge Harold H. Greene signed the Modified Final Judgment, settling the antitrust suit against AT&T. The Modified Final Judgment was based on divestiture; AT&T was required to divest itself of its twenty-two Bell Operating Companies ("BOCs"). The BOCs provided the means by which local telephone service was furnished, Bell customers gained access to the network for both local and long distance telecommunications services through the BOCs. The Modified Final Judgment, however, imposed

certain business restrictions on the newly divested BOCs. Specifically, the BOCs were prohibited from providing inter-LATA services (which are long distance services involving calls that terminated outside the "local access and transport area" in which they originate, as defined in the Modified Final Judgment), or any non-telecommunications services, and from manufacturing telecommunications equipment. In addition, the Modified Final Judgment required the BOCs to provide all interexchange carriers (*i.e.*, long distance providers) with exchange access that was equal in type, quality and price to the access provided to AT&T. *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L.Ed.2d 472 (1983).

21. On January 1, 1984, divestiture of the Bell System by AT&T took effect. AT&T divested the seven Regional Bell Operating Companies ("RBOCs") and exited the local telephone business. The RBOCs were barred from providing long distance services. The seven RBOCs became known as the Baby Bells and included: Ameritech; SBC Communications; Pacific Telesis; Bell South; US West; Bell Atlantic; and NYNEX. SBC became the parent corporation of Southwestern Bell, and Pacific Telesis became the parent corporation of Pacific Bell and Nevada Bell. SBC and Pacific Telesis merged in early 1997. NYNEX and Bell Atlantic merged in mid-1997 and became known as Bell Atlantic Corporation. Bell Atlantic later merged with GTE Corporation and is now doing business as Verizon Communications, Inc.

22. Local telephone companies such as the Bell Operating Companies are commonly referred to as local exchange carriers ("LECs") and provide business and residential customers with local telephone and/or high speed internet services.

23. In addition to the Bell Operating Companies, there are hundreds of other local exchange carriers operating in the United States. These local exchange carriers generally offer the same services as the Bell Operating Companies. Al-

though GTE was not one of the original Bell Operating Companies, prior to merging with Bell Atlantic it acquired local telephone systems in 28 states and was one of the largest local phone companies in the nation in terms of telephone lines. Local exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory authorities.

24. A consent decree also was entered against GTE in 1984. *United States v. GTE Corp.*, 1985-1 Trade Cas. (CCH) § 66.355 (D.D.C. 1984) ("GTE Consent Decree"). The GTE Consent Decree was prompted by GTE's acquisition of one of the largest long-distance companies in the United States, and was based upon the same concerns underlying the AT&T consent decree with the United States. Under the GTE Consent Decree, operating companies (*i.e.*, the local exchange providers) were prohibited from providing long distance services, but GTE Corporation itself was permitted to provide long-distance services through other subsidiaries. GTE was required to maintain total separation between its long distance operations and the GTE operating companies, so that those companies could not use their position as exclusive local telephone service providers within their franchised areas to lessen competition in long distance services.

B. The Telecommunications Act of 1996

25. On February 8, 1996, the Telecommunications Act of 1996 became law when it was signed by President Clinton. Pub. L. No. 104, 110 Stat. 56. The Act amends the Communications Act of 1934. (See 47 U.S.C. § 609, Historical and Statutory Notes.) The Act changed the landscape of federal and state telecommunications regulatory policies and the telecommunications industry.

26. The Act adopts a pro-competitive framework for the telecommunications industry in the United States. It opens the markets for both local telephone and long-distance services to effective competition.

27. Because of their prior unique existence as government granted monopolies and the benefits that they enjoyed as government granted monopolies, the Act requires that the LECs, including Defendants, must provide potential competitors access and connections to their lines and equipment on just, reasonable and non-discriminatory terms.

28. The Act also requires the incumbent local exchange companies ("ILEC") to provide competitors with the same quality of service that the incumbent local exchange carriers provide to themselves or their own customers. The Act specifically defines an ILEC as follows: "With respect to an area, the local exchange carrier that on February 8, 1996, provided telephone exchange service in such area." 47 U.S.C. § 251. The seven original RBOCs, GTE and Defendants herein are ILECs.

29. With respect to long-distance service, the Act establishes a detailed mechanism for the RBOCs to compete for the first time in the long distance business. Unlike the RBOCs, GTE was allowed to expand into long-distance telephone service as soon as the Act became law on February 8, 1996.

30. Pursuant to the Act, before the respective RBOCs can offer long-distance telephone service, they must, *inter alia*, satisfy a 14-point checklist of requirements and demonstrate that there is competition in their respective local markets. It is up to the FCC in coordination with the Department of Justice and various state public utilities commissions to decide, upon request by an RBOC, when the RBOC has met the requirements.

31. Section 251 of the Act (47 U.S.C. § 251) imposes certain obligations on ILECs designed to permit new entrants to use some or all of the ILECs' networks to offer local-exchange services.

32. Section 251 of the Act requires an ILEC to: (1) allow a competitor to interconnect with its network so that the com-

petitor can provide calls to and from that network; (2) sell to competitors access to components of its network, called network elements, on an unbundled or individual basis; and (3) sell its retail telephone services to competitors at wholesale prices. All of these requirements of an ILEC are to be provided by the ILEC "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Id.* Section 251 imposes specific obligations on telecommunications carriers designed to promote competition in local exchange markets across the country. Federal Register/Vol. 61. No. 169, August 29, 1996, at 45476.

33. The Act directed the FCC to establish regulations to implement § 251's requirements within six months of its enactment. On August 8, 1996, the FCC released its Report and Order ("Report and Order").

34. The Report and Order promulgated "national rules and regulations implementing the statutory requirements of the Act intended to encourage the development of competition in local exchange and exchange access markets." Federal Register/Vol. 61. No. 169, August 29, 1996 at 45476.

35. GTE and the RBOCs appealed the Report and Order to the 8th Circuit, and on October 15, 1996, the 8th Circuit stayed the Report and Order, including its pricing rules and regulations, pending a decision on the merits. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). The group defending the Report and Order included, among others, the FCC and the U.S. Department of Justice.

36. On July 18, 1997, the U.S. Court of Appeals for the Eighth Circuit filed its Opinion in the *Iowa Utilities Board v. FCC* case. *Iowa Utils. Bd.v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Court vacated certain provisions of the FCC's Report and Order and upheld the remainder. Specifically, the Court stated: "We decline the petitioners' request to vacate the FCC's entire First Report and Order and limit our rejection of FCC rules only to those that we have specifically overturned in this opinion." *Id.* at 819. In a footnote, the

Court stated: "In total we vacate the following provisions: 47 C.F.R. §§ 51.303 51.305(a)(4) 51.311(c)-f 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so) 51.405 51.501-51.515 (inclusive except for 51.515 (b) 51.601-51.611 (inclusive) 51.701-51.717 (inclusive except for 51.701 51.703 51.709(b) 51.7119a0910 51.7159d0 and 51.717 but only as they apply to CMRS providers) 51.809 First Report and Order ¶¶ 101-103 121-128 180. We also vacate the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration dated September 27 1996." *Id.*

C. <u>The RBOCs' Market Allocation and Refusal to Compete</u>

37. The 1996 Telecommunications Act authorized RBOCs to offer local telephone and/or high speed internet services in each other's territories, yet they have stayed almost completely out of one another's markets. Indeed, "[t]he major telephone companies have not sought to provide local telephone service outside of their home territories." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 2. "Major incumbent service providers have failed to attack markets within their industry . . . [m]ajor incumbent service providers have failed to use their facilities to attack cross markets." *Id.* at 20.

38. "It was hoped that the large incumbent local monopoly companies (RBOCs) might attack their neighbors' service areas, as they are the best situated to do so. But such competition has not happened. The incumbent local exchange carriers (RBOCs) have simply not tried to enter each other's service territories in any significant way." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 13.

39. Although the RBOCs contend that CLECs are hurting them by leasing network components at below-cost rates, the RBOCs have refrained from engaging in meaningful head-to-head competition in each other's markets. For example, "[i]n New York, SBC served a grand total of six residential lines at the end of 2001." Joan Campion, *Competition Is Vital For Phone Customers*, Chicago Tribune, Nov. 11, 2002, Commentary pg. 20.

40. The failure of the RBOCs to compete with one another would be anomalous in the absence of an agreement among the RBOCs not to compete with one another in view of the fact that in significant respects, the territories that they service are non-contiguous. As reflected in Exhibit A hereto, SBC serves most of the State of Connecticut even though Verizon rather than SBC serves the surrounding states. SBC serves California and Nevada, even though Qwest serves the other surrounding states. Similarly, there are many relatively small areas within the States of California, Texas, Illinois, Michigan, Ohio, Wisconsin, Indiana and other states that are served by Verizon, even though SBC serves all surrounding territories, as illustrated in Exhibit B hereto.[1] The failure of the RBOCs that serve the surrounding territories to make significant attempts to compete in the surrounded territories is strongly suggestive of conspiracy, since the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity that such RBOCs have not meaningfully pursued.

41. In competing for business in Connecticut, Verizon's predominance in the surrounding states would have provided it with substantial competitive advantages. In competing for

---

[1] On information and belief, all or substantially all of the small areas served by Verizon that are surrounded by territories served by other RBOCs, as illustrated in Exhibit B hereto, were acquired by Verizon not as the result of competition by it with other RBOCs since the time of enactment of the Telecommunications Act, but rather through acquisition of territories served by Verizon's corporate predecessors-in-interest who served those areas prior to that time.

business in California and Nevada, Qwest's predominance in surrounding states would have given it substantial competitive advantages. In competing for the business in the many smaller territories that Verizon serves that are surrounded by territories served by other RBOCs, the dominance of those other RBOCs in surrounding areas would have given them substantial competitive advantages. Nevertheless, Verizon has not sought to compete in a meaningful manner with SBC in Connecticut, Qwest has not sought to compete meaningfully with SBC in California and Nevada, and the RBOCs that serve the areas surrounding the smaller areas served by Verizon, as illustrated on Exhibit B hereto, have not sought to compete meaningfully with Verizon in those smaller areas. In the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories.

42. On October 31, 2002, Richard Notebaert the former Chief Executive Officer of Ameritech, who sold the company to Defendant SBC in 1999 and who currently serves as the Chief Executive Officer of Defendant Qwest, was quoted in a *Chicago Tribune* article as saying it would be fundamentally wrong to compete in the SBC/Ameritech territory, adding "it might be a good way to turn a quick dollar but that doesn't make it right." Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, Oct. 31, 2002 Business, pg. 1.

43. The pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business came as Qwest announced a Third Quarter loss of $214 million and 13% fall in revenue.

44. On November 8, 2002, in response to Notebaert's remarks, the Illinois Coalition For Competitive Telecom called Notebaert's statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service." *Illinois CLECS Assail Notebaert*, State Telephone

Regulation Report, Comment, Vol. 20, No. 22. According to the article, "[t]he CLEC group said Notebaert indicated that the Bells' strategy was to divide the country into local phone 'fiefdoms,' not to compete against each other, and to devote their collective efforts to 'eliminating would-be competitors in local service.'" *Id.*

45. On December 18, 2002, United States Representatives John Conyers, Jr. of Michigan and Zoe Lofgren of California sent a letter to United States Attorney General John Ashcroft requesting that the U.S. Department of Justice, Antitrust Division investigate whether the RBOCs are violating the antitrust laws by carving up their market territories and deliberately refraining from competing with one another. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete*, Chicago Tribune, Dec. 19, 2002, Business, pg. 2; James S. Granelli, *Federal Probe of Baby Bells Urged; Comments By Chairman Of Qwest Raise Questions About The Competitive Zeal Of The Regional Phone Companies*, Los Angeles Times, Dec. 19, 2002, Business, Part 3, Pg. 3; *Conyers Asks Justice Dept. To Investigate Bells On Anticompetitive Practices*, Communications Daily, Dec. 20, 2002, Today's News. Representatives Conyers and Lofgren questioned the extent to which the RBOCs' "very apparent noncompetition policy in each others' markets is coordinated." Letter to The Honorable John D. Ashcroft dated December 18, 2002, p. 2.

46. The RBOCs do indeed communicate amongst themselves through a myriad of organizations, including but not limited to the United States Telecom Association, the Tele-Messaging Industry Association, the Alliance for Telecommunications Industry Solutions, Telecordia, Alliance for Public Technology, the Telecommunications Industry Association and the Progress and Freedom Foundation.

47. Defendants have engaged in parallel conduct in order to prevent competition in their respective local telephone and/or high speed internet services markets. "They have re-

fused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 1. Defendants also have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition from Competitive Local Exchange Carriers ("CLECS") in the their respective local telephone and/or high speed internet services markets:

(a) Defendants have failed to provide the same quality of service to competitors that Defendants provided to their own retail customers;

(b) Defendants have failed to provide access to their operational support systems ("OSS"), including on-line customer service records ("CSRs"), on a nondiscriminatory basis that places competitors at parity. Moreover, competitors do not have access to unbundled elements on the same basis on which Defendants accessed the same elements;

(c) Defendants' competitors have experienced undue delays in the provisioning of unbundled elements. Such delays are discriminatory and preclude competitors from offering service as attractive to customers as Defendants' services and on a basis that places competitors at parity with a respective Defendant;

(d) Defendants have billed customers of competitors who are converted from Defendants' retail service. As a result of Defendants' practices, customers of competitors are double-billed. Defendants' practices have severely impacted competitors' relationships with customers;

(e) Defendants have failed to provide interconnection between the network and those of competitors that is equal in quality to the interconnection that each provided itself;

(f) Defendants have refused to sell to competitors, on just, reasonable, and non-discriminatory terms, access to components of the network on an unbundled or individual basis;

(g) Defendants have refused to sell to competitors local telephone and/or high speed internet services at wholesale prices that are just, reasonable and nondiscriminatory, thereby preventing Defendants' competitors from being able to competitively resell the services to Plaintiffs and members of the Class;

(h) Defendants have refused to allow competitors to connect to essential facilities, consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" on just, reasonable and non-discriminatory terms;

(i) Defendants have used discriminatory and error filled methods to bill local telephone service competitors in order to discourage competition by making it virtually impossible for competitors to audit the bills they received from Defendants;

(j) Defendants have imposed slow and inaccurate manual order processing causing competitors to devote significant time, effort and expense to identify and rectify problems to ensure that orders were ultimately processed correctly;

(k) Defendants have used monopoly power in their respective wholesale local telephone and/or high speed internet services market in order to gain or maintain a competitive advantage in the retail market for the provision of local telephone and/or high speed interact services; and

(l) Defendants have used their respective monopoly power and exclusive control over essential facilities consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" to negotiate agreements on unfair terms with competitors who were seeking access to their respective local telephone networks. Each Defendant, possessing the exclusive and sole source of entry into its own local telephone and/or high speed internet services market, was in a superior bargaining position to competitors and potential competitors and used that superior bargaining position to dictate unfair terms upon competitors.

48. The structure of the market for local telephone services is such as to make a market allocation agreement feasible, in that the four defendants, taken together, account for as much as ninety percent or more of the markets for local telephone services within the 48 contiguous states. Elaborate communications thus would not have been necessary in order to enable Defendants to agree to allocate territories and to refrain from competing with one another. A successful conspiracy among the Defendants to allocate territories would not require such frequent communications as to make prompt detection likely.

49. If one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact. The likely immediacy of such discovery makes a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable. In this respect as well, the structure of the market was conducive to an agreement among the Defendants to allocate territories to one another.

50. Had any one of the Defendants not sought to prevent CLECs (other than the other Defendants) from competing effectively within that Defendant's allocated territory in the ways described above, the resulting greater competitive inroads into that Defendant's territory would have revealed the

degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct. In addition, the greater success of any CLEC that made substantial competitive inroads into one Defendant's territory would have enhanced the likelihood that such a CLEC might present a competitive threat in other Defendants' territories as well. In these respects as well as others, Defendants had compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition from CLECs in each of the allocated territories.

51. In the absence of any meaningful competition between the RBOCs in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

VI.

INTERSTATE TRADE AND COMMERCE

52. At times relevant herein, Defendants and/or their subsidiaries provided local and regional telephone and/or high speed internet services across state lines, and regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States. The marketing, sale and provision of local telephone and/or high speed internet services regularly occurs in and substantially affects interstate trade and commerce.

VII.

CLASS ACTION ALLEGATIONS

53. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class:

> All persons or entities who reside or resided in the continental United States (excluding Alaska and Hawaii) and are or were subscribers of local telephone and/or high speed internet services (the "Class") from February 8, 1996 to present (the "Class Period"). Excluded from the Class are the Defendants and any parent, subsidiary, corporate affiliate, officer, director or employee of a Defendant and any judge or magistrate judge assigned to entertain any portion of this case.

54. The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. The exact number and identity of Class members is unknown to Plaintiffs but can readily be ascertained from books and records maintained by Defendants or their agents. Upon information and belief, there are millions of local telephone and/or high speed internet services subscribers in the United States who are within the defined Class.

55. There are questions of law or fact common to the Class members concerning:

(a) whether Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and otherwise allocating customers and markets to one another;

(b) the duration and extent of the contract, combination or conspiracy alleged herein;

(c) whether the Defendants were participants in the contract, combination or conspiracy alleged herein;

(d) whether the alleged contract, combination or conspiracy violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

(e) whether the alleged contract, combination or conspiracy caused injury and damage to Plaintiffs and members of the Class and the appropriate measure of damages;

(f) whether a Defendant's conduct violated state antitrust laws;

(g) whether Plaintiffs and members of the Class are entitled to injunctive and other equitable relief; and

(h) whether Defendants and their co-conspirators fraudulently concealed the conspiracy alleged herein.

56. The claims of Plaintiffs are typical of the claims of each of the members of the Class. Plaintiffs and members of the Class purchased local telephone and/or high speed internet services from a Defendant or a competitor of a Defendant in the continental United States.

57. Plaintiffs will fairly and adequately protect the interests of the Class. There is no conflict of interest between Plaintiffs and other members of the Class and Plaintiffs are represented by experienced class action counsel.

58. Defendants have acted in an unlawful manner on grounds generally applicable to all members of the Class.

59. The questions of law or of fact common to the claims of the Class predominate over any questions affecting only individual class members, so that the certification of this case as a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

60. For these reasons, the proposed Class may be certified under Fed. R. Civ. P. 23.

VIII.

FRAUDULENT CONCEALMENT

61. Plaintiffs and members of the Class had no knowledge of the contract, combination or conspiracy or any facts alleged herein which might have led to the discovery thereof until shortly before the filing of this Complaint. Plaintiffs and members of the Class could not have discovered the contract, combination or conspiracy at an earlier date by the exercise of due diligence because of the affirmative, deceptive practices and techniques of secrecy employed by Defendants. Through these acts of secrecy and deception, which included affirmative acts to hide their wrongdoing, Defendants actively misled Plaintiffs and the Class about the existence and terms of their contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

COUNT I

Violation of Sherman Act § 1 – 15 U.S.C. § 1

62. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 61 as if fully set forth herein.

63. Defendants and their co-conspirators have engaged in a horizontal contract, combination or conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

64. Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by oth-

ers to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

65. The contract, combination or conspiracy has had and will continue to have the following effects:

(a) competition in the local telephone and/or high speed internet services market has been unlawfully restrained, suppressed or eliminated;

(b) Plaintiffs and members of the Class have been denied the benefits of free, open and unrestricted competition in the local telephone and/or high speed internet services markets; and

(c) the price of local telephone and/or high speed internet services in the United States have been fixed, raised, maintained or stabilized at artificially high and non-competitive levels.

66. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs and members of the Class have suffered injury to their business or property and have paid supracompetitive prices for local telephone and/or high speed interact services.

67. If not permanently enjoined, the unlawful contract, combination or conspiracy will continue and cause irreparable harm to Plaintiffs and members of the Class who have no adequate remedy at law.

COUNT II

Violation of State Antitrust Laws

68. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 67 as if fully set forth herein.

69. As described above, Defendants have engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing

not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of the following state antitrust laws.

70. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Arizona Revised Stat. §§ 44-1401, *et seq.*

71. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Cal. Bus. & Prof. Code §§ 16700, *et seq.*, and Cal. Bus, & Prof. Code §§ 17200.

72. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of violation of D.C. Code Ann. §§ 28-45031, *et seq.*

73. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Fla. Stat. §§ 501. Part II, *et seq.*

74. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Iowa Code §§ 553.4 *et seq.*

75. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Kan. Stat. Ann. §§ 50-101, *et seq.*

76. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of La. Rev. Stat. §§ 51:137, *et seq.*

77. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Me. Rev. Stat. Ann. 10, § 1101, *et seq.*

78. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mass. Ann. Laws ch. 93, *et seq.*

79. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mich. Comp. Laws Ann. §§ 445.771, *et seq.*

80. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Minn. Stat. §§ 325D.52, *et seq.*

81. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Miss. Code Ann. §§ 75-21-1, *et seq.*

82. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Nev. Rev. Stat. Ann. § 598A, *et seq.*

83. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*

84. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.M. Stat. Ann. §§ 57-1-1 *et seq.*

85. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New York General Business Law §§ 340, *et seq.* and § 349 *et seq.*

86. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.C. Gen. Stat. §§ 75-1, *et seq.*

87. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.D. Cent. Code § 51.08.1-01, *et seq.*

88. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of S.D. Codified Laws Ann. § 37-1, *et seq.*

89. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Tenn. Code Ann. §§ 47-25-101, *et seq.*

90. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Vt. Stat. Ann. 9, § 2453, *et seq.*

91. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of W.Va. Code §§ 47-18-1, *et seq.*

92. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Wis. Stat. § 133.01, *et seq.*

93. Plaintiffs and members of the Class have been injured in their business or property by reason of Defendants' anti-trust violations alleged in this Count. Their injury consists of paying higher prices for local telephone and/or high speed internet services than they would have paid in the absence of the violations alleged herein. This injury is of the type the antitrust laws of the above States and the District of Columbia were designed to prevent and flows from that which makes Defendants' conduct unlawful.

COUNT III

Unjust Enrichment

94. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 93 as if fully set forth herein.

95. Defendants have benefitted from their unlawful acts through the overpayments from Plaintiffs and other Class members and the increased profits resulting from such overpayments. It would be inequitable for Defendants to be permitted to retain the benefit of these overpayments, which were conferred by Plaintiffs and the other class members and retained by Defendants.

96. Plaintiffs and members of the Class are entitled to the establishment of a constructive trust consisting of the benefit

to Defendants of such overpayments, from which Plaintiffs and the other Class members may make claims on a pro-rata basis for restitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class pray that the Court enter judgment in their favor as follows:

A. Declaring this action to be a proper class action and certifying Plaintiffs as the representative of the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Declaring that Defendants violated and are in violation of the Sherman Act § 1 and the various state antitrust statutes alleged herein;

C. Awarding threefold the damages sustained by Plaintiffs and members of the Class as a result Defendants' violations;

D. Ordering injunctive relief preventing and restraining Defendants and all persons acting on their behalf from engaging in the unlawful acts alleged herein;

["E" omitted in original]

F. Awarding Plaintiffs and members of the Class the costs, expenses, and reasonable attorneys' fees and experts' fees for bringing and prosecuting this action; and

G. Awarding Plaintiffs and members of the Class such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(h) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: April 11, 2003
New York, New York

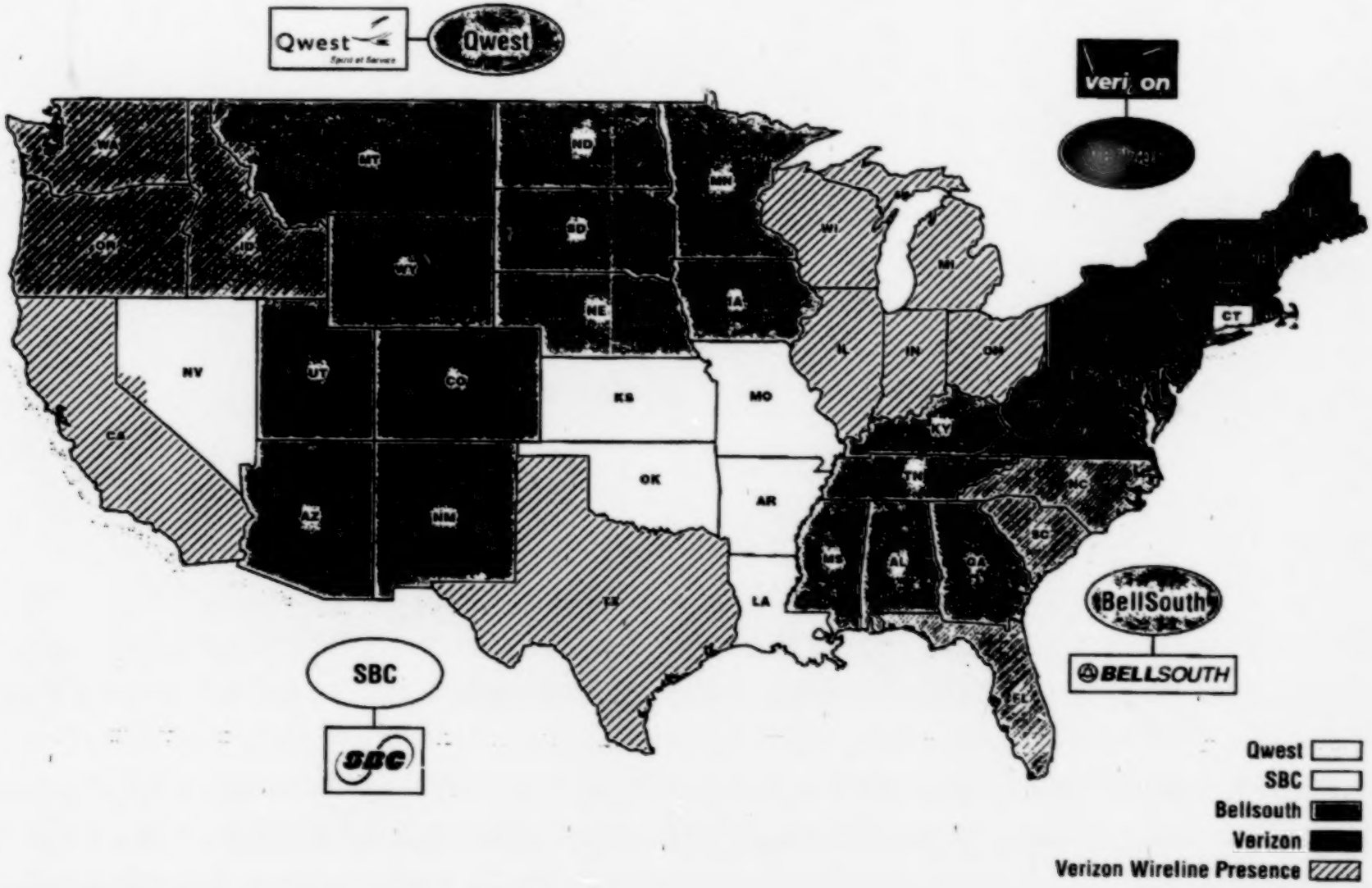
MILBERG WEISS BERSHAD HYNES & LERACH LLP

By: /s/ MICHAEL M. BUCHMAN
J. Douglas Richards (JDR-6038)
Michael M. Buchman (MB-1172)
Michael R. Reese (MR-3183)
One Pennsylvania Plaza
New York, New York 10119-0165
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

SCHIFFRIN & BARROWAY, LLP
Richard S. Schiffrin
Joseph H. Meltzer
Edward W. Ciolko
Three Bala Plaza East
Suite 400
Bala Cynwyd, Pennsylvania 19004
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Attorneys for Plaintiffs,
William Twombly and Lawrence Marcus

RBOC Territories



Verizon Wireline Presence

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

DECLARATION OF STEVEN G. BRADBURY

I, STEVEN G. BRADBURY, declare as follows:

I am a partner in the Washington, DC office of Kirkland & Ellis, and I am counsel to Verizon Communications, Inc. in this matter. I make this declaration in support of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss ("Memorandum"). I have personal knowledge of the matters set forth herein. I am admitted *pro hac vice* in the Southern District of New York for the purposes of this matter. I attest that attached as exhibits to this Declaration are true and correct copies of the following documents referenced in Defendants' Memorandum:

* * * * *

(d) Exhibit D: Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002);

(e) Exhibit E: Jon Van, *Lawmakers Seek Probe of Bells*, Chicago Tribune (Dec. 19, 2002);

(f) Exhibit F: Letter from Representative Conyers and Lofgren to Attorney General Ashcroft (Dec. 18, 2002)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 8, 2003.

/s/ STEVEN G. BRADBURY
Steven G. Bradbury (SB-5618)
(admitted *pro hac*)
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
T: (202) 879-5000
F: (202) 879-5200

EXHIBIT D

Citation Search Result Rank(R) 1 of 1 Database
10/31/02 CHICAGOTR 1 ALLNEWS
10/31/02 Chi. Trib. 1
2002 WL 102285888

(Publication page references are not available for this document.)

Chicago Tribune

Copyright 2002, Chicago Tribune. All Rights Reserved.

Thursday, October 31, 2002

Business

Ameritech customers off limits: Notebaert

By Jon Van, Tribune staff reporter.

Even though his company could use a new revenue stream, Richard Notebaert said Wednesday that he would not consider competing against his old firm for phone customers in the Chicago area.

Notebaert, the former Ameritech chief executive who now heads Qwest Communications International Inc. in Denver, said it would be fundamentally wrong to compete for Ameritech's residential customers even though Qwest could profit from the service.

"It might be a good way to turn a quick dollar," Notebaert said, "but that doesn't make it right."

Notebaert's firm reported a third-quarter loss of $214 million, or 13 cents a share, on Wednesday. Revenues fell 13 percent, to $3.8 billion from $4.37 billion a year earlier. Notebaert, who ran Ameritech until he sold it to San Antonio-based SBC Communications Inc. three years ago, took the reins at financially troubled Qwest this summer.

Under its old management, Qwest attracted attention of federal authorities for questionable accounting practices and is in the process of restating earlier financial results.

But despite the financial problems, Notebaert said he does not see expanding into new markets as a good idea. AT&T Corp. and the MCI unit of WorldCom Inc. have entered the residential market in Illinois and other Midwestern Ameritech states and have attracted thousands of new customers.

Executives at Ameritech's parent, SBC, have mounted a full-scale campaign against requirements that they sell AT&T, MCI and other rivals network service at wholesale prices.

The rivals use Ameritech's lines through a process referred to as an unbundled network element platform.

Notebaert, whose firm is the dominant local phone Bell carrier in 14 western states, stood shoulder-to-shoulder with SBC in opposing competition that uses UNE-platform wholesale rates.

"I don't think it's a sustainable economic model," Notebaert said. "It's just a nuts pricing model."

Notebaert noted that Qwest does compete to provide data and long-distance service to large Chicago-based businesses, but it said it will not offer local phone service to small businesses or residential customers.

Qwest is missing a good chance to boost revenues, said Phil Jacobson, general partner at Network Conceptions, a research and consulting firm based in Vienna, Va.

"It's an excellent opportunity for Qwest," said Jacobson, "but that could change."

The Federal Communications Commission is studying current wholesale pricing policies and will likely adjust them, he said. A company would be wise to wait until that happens before making a move, he said.

While the FCC may alter wholesale pricing rules, it is still committed to promoting competition among phone compa-

nies, said Bill Capraro Jr., president of Cimco Communications Inc., an Oakbrook Terrace-based firm that supplies communications services to businesses.

Capraro, who is a board member of an industry association representing Bell rivals, recently met with members of the FCC and has agreed to prepare a study for the federal agency that will summarize the competitors' views on how wholesale pricing could be modified.

"The FCC commissioners aren't influenced by the massive campaigning and rhetoric in the media and from lobbyists for SBC and the other Bells," said Capraro. "I came away from meeting with the FCC saying these individuals are fair, they're looking at all sides, and they're trying to help our industry and the economy."

Capraro said that Notebaert's refusal to consider using UNE platform rates to compete against another Bell company isn't surprising.

"The Bells aren't serious about competing, especially against each other," he said.

EXHIBIT E

Citation Search Result Rank(R) 1 of 1 Database
12/19/02 CHICAGOTR 2 ALLNEWS
12/19/02 Chi. Trib. 2
2002 WL 104498329
(Publication page references are not available for this document.)

Chicago Tribune

Copyright 2002, Chicago Tribune. All Rights Reserved.

Thursday, December 19, 2002

Business

Lawmakers seek probe of Bells
Do firms agree not to compete?

By Jon Van, Tribune staff reporter.

An antitrust inquiry into the lack of competition among Baby Bells for local phone customers was requested Wednesday by two members of the House Judiciary Committee.

The request to U.S. Atty. Gen. John Ashcroft cited statements reported last month in a Tribune story that Denver-based Qwest Communications International Inc. has no intention of competing for local phone service customers in Chicago or other parts of the old Ameritech territory.

Richard Notebaert, Qwest's chief executive, said that he is philosophically opposed to federal requirements that incumbent local carriers provide cut-rate wholesale service to their competitors. Notebaert also said that he thinks the requirements for unbundled network element Platform wholesale service will be revised next year, making it unwise to base a business plan on it.

Some competitive phone carriers viewed Notebaert's remarks as an admission of what has been a largely unspoken agreement that Qwest, SBC Communications Inc., Verizon

Communications Inc. and BellSouth Corp. won't compete vigorously in each other's territory.

Wednesday's letter to Ashcroft from Reps. John Conyers Jr. (D-Mich.) and Zoe Lofgren (D-Calif.) said "no one would challenge that the Bells collude extensively in their efforts to get Congress and regulators to undo market access laws" and suggests that cooperation among the giant local phone carriers may extend beyond lobbying.

"We request . . . an immediate inquiry into these non-compete practices to determine whether any illegal arrangement exists that would explain why the Bell monopolies, who claim they are falling on hard times, elect not to pursue a lucrative avenue for their shareholders," the letter concludes.

Even though many people have suggested the Bells have a tacit non-compete agreement with one another, making such a legal case would be very difficult, said Jim Speta, an assistant law professor at Northwestern University who specializes in telecommunications.

"The Bells are each others' most natural competitors, and some people are quite frustrated that they aren't competing with one another," Speta said. "To make an antitrust case, you'd want to find evidence of an agreement not to compete.

"Absent that, you'd have to establish the companies are behaving in a way that makes no economic sense unless they had a secret agreement not to compete. You'd have to show they were purposely leaving money on the table.

"These are very hard cases to put together and prove."

EXHIBIT F

[Committee members' names omitted]

[Committee members' names omitted]

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951
http://www.house.gov/judiciary

December 18, 2002

The Honorable John D. Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

As you know, one of the principal purposes of the 1996 Telecommunications Act ("1996 Act") was to spur competition in the telecommunications industry.[1] Congress voted, on an overwhelmingly bipartisan basis, to replace outdated regulations with market-oriented competition rules.

As part of the policy of promoting competition, the 1996 Act specifically authorized the Regional Bell Operating Companies – who then possessed, and now possess, monopoly control of local telecommunications markets – to compete for local telecommunications services outside their region where they could take advantage of the Act's provisions

---

[1] *See generally*, Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat 56 (1996) (1996 Act), 47 U.S.C. § 251.

that give them market access to the incumbent's facilities.[2] Indeed, Congress enacted the 1996 Act, giving the Bells the ability to access lucrative long distance markets from which they had been prohibited,[3] relying, in part, on public pledges that they would seek to advance the goals of competition by entering local telecommunications markets outside their region.[4]

It is in this context that we are troubled by the public declaration of the Chief Executive Officer of Qwest, Richard Notebaert, that it would be fundamentally wrong to compete in the territory of SBC/Ameritech noting that it "might be a good way to turn a quick dollar but that doesn't make it right."[5] Interestingly, this pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business, came as Qwest an-

---

[2] *See* 47 U.S.C. §§ 271(b)(2) & 271 (j).

[3] *See* H.R. Rep. No. 104-458, 104th Congress, 2d Sess. 1 (1996). The long distance restriction was also known as the "inter-LATA" restriction. This is because the Modified Final Judgment (MFJ) created 197 local access and transport areas or "LATAs," representing areas across which the Bells are not permitted to offer telecommunications services. For example, under the MFJ, Michigan Bell (Ameritech) could not complete a call from Detroit to Lansing since it would cross a LATA; instead Michigan Bell was required to hand off the call to a long distance company who completed the call for the consumer. (LATAs are not synonymous with area codes.)

[4] "*Summary of SBC/Ameritech Conditions*," para. IV, 21, www.fcc.gov/bureaus/common_carrier/news_releases/1999/nrc9077a.txt ("Within 30 months from the merger closing, SBC/Ameritech will enter at least 30 major markets outside its region as a facilities-based competitive provider of local services to business and residential customers. SBC/Ameritech is liable for voluntary incentive payments of nearly $1.2 billion dollars if it misses the entry requirements in all 30 markets.")

[5] "*Ameritech Customers Off Limits: Notebaert*," Jon Van, Chicago Tribune (Oct. 31, 2002).

nounced a 3rd quarter loss of $214 million and 13% fall in revenue, to $3.8 billion from $4.37 billion a year earlier.

In our view, this public pronouncement seems to suggest the need for scrutiny by the Antitrust Division. As you are well aware, the Sherman Act proscribes, with criminal and civil penalties, agreements to divide market territories.[7] A long line of cases holds that any such agreement would be a *per se* violation of the Sherman Act.[8]

No one would challenge the assertion that the Bells collude extensively in their efforts to get Congress and regulators to undo market access laws. In near choreographed unison they bemoan the laws that require them to open their monopoly facilities to competition. It is less clear, however, to what extent their very apparent non-competition policy in each others' markets is coordinated. While collusion by the Bells on legislative or regulatory matters is permitted under the antitrust laws, any arrangement to carve up market territories would not be permitted under antitrust law.

It is imperative, in our view, that the Justice Department closely examine whether the coordinated market behavior on the part of the Bells justifies the dismissal of their non-compete policy as merely "conscious parallelism." In doing such an analysis, we note that, in *Milgram v. Loew's Inc.*,[9] the Third Circuit held that "uniformity in policy forms the basis of an inference of joint action" and that when a firm

---

[6] "*FCC Ensures Bell Atlantic Compliance with Terms of Long Distance Approval; Bell Atlantic Agrees to Pay Up to $27 Million*," FCC News (March 9, 2000).

[7] 15 U.S.C. § 1.

[8] *See U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 1131 L.Ed.2d 515 (1972) (holding that market divisions utilizing retail licensing is *per se* illegal); *General Leaseways Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir., 1984).

[9] 192 F.2d 579 (3rd Cir., 1951).

"acted in apparent contradiction of its own self interest [t]his strengthens considerably the inference of conspiracy."[10]

Indeed, the courts have held that seemingly coordinated and irrational policies or practices that carve up markets with anticompetitive effects warrant scrutiny,[11] and that seemingly casual agreements that produce anticompetitive effects may run afoul of the antitrust laws.[12]

Therefore, we request that you open an immediate inquiry into these non-compete practices to determine whether any illegal arrangement exists that would explain why the Bell monopolies, who claim they are falling on hard times, elect not to pursue a lucrative avenue for their shareholders.

Sincerely,

/s/ John Conyers
Ranking Member

/s/ Zoe Lofgren
Member of Congress

cc: Honorable F. James Sensenbrenner, Jr.

---

[10] *Id.* at 583; *see also Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

[11] *Boise Cascade Corp. v. Federal Trade Commission*, 637 F.2d 573 (9th Cir., 1980).

[12] *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *American Column & Lumber Co., v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil*, 262 U.S. 37 (1923).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

AFFIDAVIT OF MICHAEL M. BUCHMAN

MICHAEL M. BUCHMAN, an attorney, being duly sworn deposes and says as follows:

1. I am a member of Milberg Weiss Bershad Hynes & Lerach LLP. I am duly admitted to the bars of the states of New York and Connecticut. I am also a member of this Court. I submit this Affidavit in further support of Plaintiffs' Memorandum of Law In Opposition To Defendants' Joint Motion To Dismiss and Plaintiffs' Memorandum Of Law In Opposition To BellSouth's Motion To Dismiss For Lack Of Personal Jurisdiction And Improper Venue.

A. Plaintiffs' Memorandum of Law In Opposition To Defendants' Joint Motion To Dismiss

2. Annexed hereto as Exhibit A is a true and correct copy of 148 Cong. Rec. H. 574, 590-592 (Feb. 27, 2002) (statement of Ms. Kilpatrick).

3. Annexed hereto as Exhibit B is a true and correct copy of James Sensenbrenner and House Judiciary Comm., 107th Cong., *Internet Freedom and Broadband Deployment Act of 2001 For 8 Pt. Head If More Than 3 Lines Adverse Report*, H.R. Doc. No. 107-83 Prt. 2.

4. Annexed hereto as Exhibit C is a true and correct copy of Charles Nolter, *Taking the Local*, 28 The Deal 9, June 2, 2003, at 22.

5. Annexed hereto as Exhibit D is a true and correct copy of Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, October 31, 2002.

6. Annexed hereto as Exhibit E is a true and correct copy of the Decision of the Connecticut Department of Public Utility Control Commission, Docket No. 95-03-01, *Application of the Southern New England Telephone Company For Financial Review And Proposed Framework For Alternative Regulation*, dated Mar. 13, 1996.

7. Annexed hereto as Exhibit F is a true and correct copy of the Opinion and Order of the New York Public Serv. Comm'n, Opinion No. 96-13, *Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market*, dated May 22, 1996.

8. Annexed hereto as Exhibit G is a true and correct copy of the Rulemaking Order of the Pennsylvania Public Utility Commission, Docket No. L-00940095, *Rulemaking Re Updating and Revising Existing Filing Requirement Regulations 52 Pa. Code §§ 53.52-53.53 – Telecommunications Utilities*, dated June 2, 2000.

9. Annexed hereto as Exhibit H is a true and correct copy of the Application Requirements For Requesting Certification to Provide Competitive Local Exchange Services ob-

tained from the Public Service Commission of Wisconsin available at: http://psc.wi.gov.telecom/LECresel/lecapp.htm.

10. Annexed hereto as Exhibit I is a true and correct copy of the Order Concerning Motion For Reconsideration in the Matter of Local Exchange and Local Exchange Access Telecommunications Competition before the North Carolina Public Utilities Commission, Docket No. P-100, Sub 133, dated November 29, 2000.

B. Plaintiffs' Memorandum Of Law In Opposition To BellSouth's Motion To Dismiss For Lack Of Personal Jurisdiction And Improper Venue

11. Annexed hereto as Exhibit J is a true and correct copy of *Daily Briefing*, Atl. J. & Const., Dec. 14, 2001, at 2G.

12. Annexed hereto as Exhibit K is a true and correct copy of BellSouth Corp., *Prospectus Supplement* (Oct. 22, 2001), *available at* http://www.sec.gov/edgar.shtml.

13. Annexed hereto as Exhibit L is a true and correct copy of an Order of the New York Public Serv. Comm'n, Case 96-C1183, *Petition of Bell South Long Distance Inc. for a Certificate of Public Convenience and Necessity to Resell All Forms of Telephone Service in New York*, dated Apr. 7, 1997.

14. Annexed hereto as Exhibit M is a true and correct copy of a list of BellSouth subsidiaries as of December 31, 2002, BellSouth Corp. Form 10-K filed with the Securities and Exchange Commission on February 28, 2003.

15. Annexed hereto as Exhibit N is a true and correct copy of Entity Information Sheets, NYS Dept. of State Div. of Corps.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 20, 2003
New York, New York

/s/ MICHAEL M. BUCHMAN
Michael M. Buchman

[Notary Omitted]

EXHIBIT A

Congressional Record – House
Wednesday, February 27, 2002
107th Congress, 2nd Session
148 Cong. Rec. H574

[*H574]

* * * * *

The SPEAKER pro tempore (Mr. SIMPSON). Pursuant to House Resolution 350 and rule XVIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 1542.

The Chair designates the gentleman from Texas (Mr. BONILLA) as chairman of the Committee of the Whole, and requests the gentleman from Illinois (Mr. LAHOOD) to assume the chair temporarily.

[*H575] IN THE COMMITTEE OF THE WHOLE

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 1542) to deregulate the Internet and high speed data services, and for other purposes, with Mr. LAHOOD (Chairman pro tempore) in the chair.

* * * * *

[*H590]

* * * * *

Ms. KILPATRICK. Mr. Chairman, today I rise in opposition to H.R. 1542, the Tauzin-Dingell Broadband legislation. I am simply not confident that this bill provides adequate protection to consumers. I have watched, over the years, while as a nation, we have boldly made our way down the road of deregulation. We deregulated the Savings and Loan

Industry and watched them implode under the weight of their own largess. We saw the same with both the Airlines Industry and the former AT&T and Bell behemoths. In all of those [*H591] cases the consumer paid the price through increased fees, tax subsidies and decreased services.

Now, given the choice to either regulate cable and satellite or deregulate the Baby Bells, who we know to have a history of bad behavior, we are urged to deregulate the bad actors. In my eyes, the underlying legislation before the House represents a choice to deregulate the bad actors.

Without amendment, the underlying bill would limit State and Federal regulation of the pipeline we know as the Internet to an antitrust suit against the Bell Companies. This Mr. and Mrs. America is no choice. This bill gives consumers, who are my constituents and the people that I care about most, no protection if prices are unjustly increased and no protection for failing service quality.

Internet Service Providers oppose the measure because it would subject them to the unrestrained will of the Baby Bells.

Small Innovative Telecommunications Companies oppose the measure because it will force them out of the market.

Thirty-one Public Utility Commissions, including Michigan's oppose this bill.

The National Governors Association opposes this bill.

The National League of Cities opposes Tauzin-Dingell.

The Council of State Governments opposes Tauzin-Dingell.

Most Consumers Groups oppose this bill because it will lead to price increases and inept service.

Mr. Chairman, as you can see there is strong opposition to this measure. Again, I am not confident that any amendment

can fix this bill and protect the consumers of Michigan's 15th district. So I will oppose this measure on final passage.

Mr. EVANS. Mr. Chairman, I rise in opposition to H.R. 1542, the Internet Freedom and Broadband Deployment Act. I believe it will harm competition within the telecommunications industry and reduce oversight of this growing and important sector of our economy, resulting in less service and choice for all Americans.

Broadband internet access is rapidly becoming a necessity for individuals and communities trying to keep up with trends in education and economic development. The internet is a tremendous resource for information, communication, and commerce. Understandably, individuals living in communities without access to broadband are frustrated by their inability to take full advantage of all the internet has to offer.

H.R. 1542 is the Bell Companies' proposed solution to the so-called "digital divide." They claim onerous regulations established by the Telecommunications Act of 1996 have prevented them from deploying broadband to underserved communities. Actually, the 1996 Act merely required the Bell Companies to meet a 14 point competitive checklist before offering long-distance service in their home markets. The promise of lucrative long-distance markets was to serve as an incentive for the Bell Companies to open their markets to competitors.

By exempting Bell Companies who wish to offer broadband services from competitive requirements, H.R. 1542 essentially guts all of the competitive elements of the 1996 Act. Bell Companies will no longer have to guarantee network access to upstart telecommunications companies who have provided consumers with alternatives. Additionally, the bill will make it impossible for the FCC and states to regulate costs and customer service standards, which could send prices skyrocketing and leave consumers with no recourse for substandard service. Given our recent experiences with de-

regulation of essential consumer services, it seems foolish to believe that further deregulation of the telecommunications industry is the answer for rural America.

Over the past few years, the Bell Companies have developed a shockingly poor record of customer service. In order to spur competition, the 1996 Act requires the Bell Companies to allow Competitive Local Exchange Carriers (CLECs) access to their lines when consumers choose to do business with CLECs rather than a Bell. The Bells frequently refuse to comply with these requests in a timely manner. Since 1996, Bell Companies have paid over $2 billion in fines. They clearly believe it is to their advantage to pay penalties for violations of the 1996 Act rather than open their markets. Instead of taking steps to aggressively enforce the 1996 Act, Congress has proposed a bill that would eliminate the FCC's and states' ability to regulate costs and protect consumers.

There is no reason to believe that passing H.R. 1542 will speed broadband deployment to rural America. The fact is, the Bell Companies have chosen not to provide even basic services in many of the rural communities they claim will be helped by H.R. 1542. Since they are only required to upgrade infrastructure for communities they already serve, many rural consumers are left out entirely. Another problem is that the broadband service requirement only applies to consumers that live within three miles of a Bell Company central station. Those living outside of a three mile radius are given no guarantees of broadband access at all. Again, rural America is being left out.

As for being shut out of the broadband market, the numbers speak otherwise. BellSouth tripled its DSL customer base in 2001. SBC, Verizon, and Qwest have similarly built and maintained a network of broadband customers. A large majority of Americans already have access to broadband, but very few have chosen to subscribe because of the cost. The FCC has concluded that broadband is being deployed in a

reasonable and timely manner. HR 1542 is not about offering broadband services. It is about eliminating competition and oversight in the telecommunications industry for the Bell Companies.

The list of organizations opposing HR 1542 grows longer every day. The Public Utility Commissions of 31 states, AARP, the Gray Panthers, Consumers Union, the Consumer Federation of America, Americans for Tax Reform, Citizens Against Government Waste, and the National Retail Federation have all opposed the bill. HR 1542 will not speed the delivery of broadband to rural America but it will undermine consumer rights nationwide. Americans deserve better.

* * * * *

EXHIBIT B

107TH CONGRESS REPT. 107-83
HOUSE OF REPRESENTATIVES
1st Session Part 2

INTERNET FREEDOM AND BROADBAND DEPLOYMENT ACT OF 2001

June 18, 2001. – Ordered to be printed

MR. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1542]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1542) to deregulate the Internet and high speed data services, and for other purposes, having considered the same, reports unfavorably thereon with amendments and recommends that the amendments be agreed to and that the bill do not pass.

* * * * *

[69]

ADDITIONAL VIEWS

We concur with the Committee's views and strongly endorse the Committee's unfavorable recommendation of H.R.

1542. To our knowledge, the Committee's last adverse report on a telecommunications-related bill was over twenty years ago on H.R. 6121,[1] the "Telecommunications Act of 1980," which would have severely undermined the Government's antitrust litigation that was then pending against AT&T, and which would have lifted critical portions of the 1956 judicial consent decree against AT&T. Now, as in 1980, this Committee must vigorously protect against legislation designed to benefit monopolists, impede competition, and hurt consumers. In 1980, the Committee's adverse report stopped H.R. 6121 dead in its tracks, and we envision history repeating itself here. No stronger message could have been sent to the House – H.R. 1542 is bad policy and bad for the people of the United States.

In its current form, H.R. 1542 destroys the bargain made in the Telecommunications Act of 1996 (the "1996 Act") by permitting the Bells to provide long distance data services before meeting the competitive checklist in section 271 of the 1996 Act. In doing so, the bill also eliminates the Attorney General's historic role in identifying anti-competitive behavior by the Bell companies. We support the Sensenbrenner Amendment because it restores the Attorney General's role by requiring the Bells to demonstrate that they have opened their local telephone monopoly to competition before they can offer long distance data services.[2] In effect, the market

---

[1] H.R. 6121, the "Telecommunications Act of 1980," H.Rept. 96-1252, pt. 2, 96th Cong. 2d Sess. (Oct. 8, 1980) (adversely reporting H.R. 6121 out of the Committee on the Judiciary).

[2] Under both Democratic and Republican leadership, this Committee has always voted on an overwhelmingly bipartisan basis to preserve the Department of Justice's role in ensuring that the telecommunications marketplace is open to competitors. We must not forget that it was the Department of Justice that brought the antitrust suit that ultimately broke up the old "Ma Bell" system. The Department of Justice, through Republican and Democratic Administrations alike, has applied its antitrust and telecommunications industry expertise to these markets, to foster competition and deter and redress anti-competitive activity. In 1996, when we

opening requirements of section 271 of the 1996 Act which were taken out of H.R. 1542, were re-imposed by the Sensenbrenner Amendment.

However, the Judiciary Committee's referral on H.R. 1542 was extremely limited, relating only to provisions that "propose(d) to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934."[3] As a result, the Committee was unable to amend section 4 of the bill – arguably the most offensive portion of the bill.

We take this opportunity to put into context the historic role that the Judiciary Committee has played in ensuring that antitrust considerations are taken into account when setting telecommunications policy. We also expand on the two most egregious portions [70] of H.R. 1542 that were deemed to be outside the Committee's referral. First, section 4 of H.R. 1542 rolls back key portions of the 1996 Act regarding unbundling and line sharing, which likely will have a negative impact on competition in the telecommunications industry. Second, section 4 completely deregulates high speed data services offered by the Bell operating companies, which would deregulate two areas over which the Committee has repeatedly exercised jurisdiction: "spamming" and law enforcement in telecommunications. We therefore strongly oppose H.R. 1542 and urge the House, based upon our adverse recommendation, not to consider this bill.

I. HISTORICAL BACKGROUND

From the late 19th century until the historic 1982 antitrust consent decree was entered, the American Telephone & Telegraph Company ("AT&T") dominated the American telecommunications market. The government made several

---

considered the Telecommunications Act, the Committee voted overwhelmingly to give the Department of Justice a co-equal role with the FCC to review the Bell monopolies' entry into both voice and data long distance service.

[3] Cong. Rec. H2709, (daily ed. May 24, 2001).

efforts to control AT&T's monopoly power – a Department of Justice antitrust suit brought in 1913, the passage of the Communications Act of 1934, and a second Department of Justice antitrust suit brought in 1949. None of these efforts succeeded in opening the telecommunications market to effective competition.

Because AT&T continued to take advantage of its monopoly power to the detriment of consumers, DOJ brought a third antitrust action against AT&T in 1974. In the 1974 case brought by Republican Attorney General William Saxbe, the government sought, in part, to prevent AT&T from using its local telephone monopoly to discriminate against its competitors in long distance and equipment manufacturing and to use revenues from its regulated monopoly in local telephone service to subsidize its other non-regulated business ventures, a practice known as cross-subsidization. That action led to a settlement and consent decree entered in 1982 during the Reagan Administration.[4] This consent decree is commonly known as the Modification of Final Judgment or the "MFJ."

Under the terms of the MFJ, AT&T retained its long distance and manufacturing businesses, but divested itself of its local telephone exchange monopoly. Effective January 1, 1984, the local telephone exchange monopolies were taken over by seven regional Bell operating companies ("RBOCs") – NYNEX, Bell Atlantic, BellSouth, Ameritech, SBC Communications, Inc. (formerly known as Southwestern Bell), U.S. West, and Pacific Telesis.

The MFJ required an RBOC to demonstrate that there was "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter"[5] before it could enter four lines of business: (1) providing long distance service; (2) manufacturing or providing communica-

---

[4] *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd*, 460 U.S. 1001 (1983)

[5] AT&T, 522 F. Supp. at 231.

tions equipment and manufacturing customer premises equipment; (3) providing information services; and (4) entering into any other non-telecommunications [71] business. The courts subsequently removed the restrictions on information services and non-telecommunications businesses.[6]

In the years following the MFJ, the long distance industry became highly competitive with the entrance of numerous companies offering consumers greater choices and lower prices. In contrast, the RBOCs resisted opening their networks to competitive providers of local telecommunications services, despite some Federal and State regulatory initiatives to require them to do so. As a result, the local telephone exchange market remained under monopoly control by the RBOCs.

The impetus for 1996 Act arose from the application and effect of the MFJ. The MFJ prevented the RBOCs from entering the long distance business because of their monopoly control over the local exchange. Congress structured the 1996 Act to offer the RBOCs a basic trade: the RBOCs were to open their exchanges to local competitors and, in return, they were to be allowed entry into the long distance market. The 1996 Act sought to accomplish this largely by two interrelated provisions. The first is section 251, which empowers the FCC to impose access and interconnection obligations on Incumbent Local Exchange Carriers ("ILECs," the largest of which were the RBOCs and GTE, before GTE merged with Bell Atlantic to form Verizon) to ensure competition in local exchange and exchange access carriers.[7]

---

[6] *United States* v. *Western Electric Co.*, 767 F. Supp. 308, 327 32 (D.D.C. 1991) (removing information services bar), *aff'd*, 993 F. 2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 602-03 (D.D.C. 1987) (removing non-telecommunications business bar), *aff'd in relevant part*, 900 F. 2d 283 (D.C. Cir.), *cert. denied*, 498 911 (1990).

[7] Upon passage of the 1996 Act, section 251 was immediately tied up in litigation. Not until January 1999 – nearly three years after enactment

The second "pro-competitive" provision of the 1996 Act is section 271, which presents the formal test by which the RBOCs can obtain authority to provide in-region long distance service. Elements of the test include: (1) compliance with a competitive checklist based in significant part on section 251's interconnection and unbundling requirements, which is designed to assure that the RBOC local exchange market is open to competition;[8] (2) existence of a "facilities based" competitor, or in the absence of such a competitor, a State-approved statement of generally available terms to interconnection and access;[9] (3) compliance with a separate affiliate requirement and non-discrimination safeguards described in section 272 of the Act;[10] and (4) a finding by the FCC that authorization is consistent with the "public interest, convenience and necessity." The 1996 Act requires the FCC to give "substantial [72] weight" to the Department of Justice's opinion in the ultimate determination regarding Bell entry.[11]

When the 1996 Act was enacted, many observers predicted that the RBOCs would quickly comply with the competitive

---

of the 1996 Act – did the U.S. Supreme Court rule that the FCC had the authority to prescribe crucial rules to implement section 251. *Iowa Utilities Board* v. *FCC*, 119 S. Ct. 721 (1999). Still pending before the Supreme Court is a separate challenge to the FCC's principles for pricing interconnection and network elements. *Verizon Communications, Inc., et al.* v. *FCC, et al.*, 219 F.3d 744 (8th Cir. 2000), *cert. granted*, Jan. 22, 2001. The uncertainty resulting from these lawsuits has delayed implementation of the market-opening requirements of the 1996 Act. Adding further to this delay and uncertainty, the RBOCs also challenged the constitutionality of section 271 as an unlawful bill of attainder, despite their support for the legislation at the time of enactment. These challenges were unsuccessful. *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (5th Cir. 1998); *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (D.C. Cir. 1998).

[8] See sections 271(c)(2)(B), 271(d)(3)(a)(ii).

[9] See sections 271(c)(1)(A) and (B).

[10] See section 271(d)(3)(b).

[11] *Id.*

checklist so that they could begin competing in long distance. The RBOCs also indicated that they planned to enter the cable television business. Observers also believed that the long distance companies would be able to obtain the interconnection and access to the incumbents' network elements necessary for the provision of local service. As for the cable companies, most observers hoped that some or all of them would enter the telephone business, and that they would face substantial competition in the cable business from satellite companies and telephone companies. Unfortunately, these developments largely have not come to pass.

Believing in the promise of the 1996 Act, companies who compete with the Bells to provide broadband service, called competitive local exchange carriers ("CLECs"), invested tens of billions of dollars, created 100,000 jobs, and began the enormously difficult work of providing choice to consumers and businesses. But today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies. Tens of thousands of newly created jobs disappeared, billions of dollars of value are gone, many CLECs are bankrupt, and the capital markets are nearly closed to many of the competitors.

The limited development of competition in the past five years is not an indication that the 1996 Act has failed. We continue to believe that the principles and procedures embodied in that statute, properly implemented and enforced, offer a foundation for a competitive telecommunications marketplace. Rather, what the past five years have shown is that legislating the removal of the legal barriers to entry does not by itself bring competition into being. Instead of seeing the RBOCs eager to enter each others' businesses, there has been a general reluctance to compete. While the RBOCs could have entered the long distance business by opening their local markets, they have largely chosen not to do so.

Consumer groups and CLECs have seen the Bells slow to open up their networks to competition, as is evidenced by the fact that more than 90% of long distance calls still go through some component of the Bells' network. While innovation has flourished and prices have been slashed in the area of long distance, the reverse has occurred in the local network. In addition, in the past five years, we have seen unprecedented industry consolidation. Instead of seven RBOCs and GTE, we now have only four: Verizon, BellSouth, SBC, and Qwest. This consolidation has also reduced the prospects for competition.

Now, some want to bring the same competition problems we have seen in the local loop to the broadband market. Broadband is the critical condition to bringing the promise of the Internet home to millions of American consumers and businesses through streaming audio and video and other high end uses. The last thing we need to do is bring the same high prices, shoddy service and stifling of [73] innovation we have seen in the local telephone market to the high speed Internet market.

II. SECTION 4 OF H.R. 1542 SEVERELY HARMS COMPETITION BY ROLLING BACK THE UNBUNDLING AND LINE-SHARING REQUIREMENTS OF SECTION 251 AND BY PREEMPTING FCC AND STATE REGULATIONS

The Sensenbrenner Amendment greatly improved H.R. 1542 by restoring the Attorney General's role in the section 271 application process, thereby ensuring that the RBOCs open their networks to competition before being permitted to offer long distance data services. Unfortunately, due to the Committee's narrow referral on H.R. 1542, we were unable to address section 4 of the bill, which contains some of the most anti-competitive provisions.

First and foremost, the Sensenbrenner Amendment could not fix the portions of the bill that roll back the line-sharing

and unbundling requirements contained in section 251 of the 1996 Act. Even as amended, H.R. 1542 would allow the Bells to continue to act as monopolists and abuse their power by denying competitors access to the local loop.

Second, the amendment could not correct the fact that H.R. 1542 would severely limit Federal and State authority to prevent "spamming" over high speed Internet services and to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. The remainder of this section discusses these problematic portions of H.R. 1542 that were unamendable due to the referral, yet clearly fall within the Committee's jurisdiction.

H.R. 1542 Eviscerates the Market-Opening Requirements of Section 251 of the 1996 Act

The Committee was unable to amend some of the most offensive portions of H.R. 1542 that dismantle the market-opening requirements of section 251 of the 1996 Act. section 251's "unbundling" and "line-sharing" requirements are the principal bases upon which many competitors (predominantly CLECs) are currently able to provide voice and data services that compete with the local phone companies (ILECs). H.R. 1542 undermines the unbundling and line-sharing requirements so severely that it could effectively kill off competition.

"Unbundling" is the requirement that the ILECs make the components of their networks available to competitors at cost-based prices. "Unbundled network elements" (or "UNEs") are the piece-part elements of the local phone network. They include the "local loop" that runs from people's homes to the ILEC's central office and the "trunk" that leads from the central office to the long distance phone network. Under the unbundling requirements of section 251, companies can lease the UNEs from the ILECs and use them in

conjunction with facilities they own and deploy in order to provide competitive voice and data services. A CLEC also has the right under section 251 to "co-locate" its own equipment in the ILEC's central office.

Section 4(b) of H.R. 1542 rolls back the FCC's unbundling rules, depriving new entrants of access to the facilities (the UNEs) they [74] need to compete. Specifically, CLECs would no longer be able to lease various network elements available under current FCC rules to provide high speed data service. Under H.R. 1542, the only way that a company could provide such service would be to build an extensive network from scratch. No new entrant – not even a company that plans eventually to operate its own network – can be expected to build out that network before signing up a single customer. MCI and Sprint began as resellers of AT&T, building up a customer base and market credibility that enabled them to make the investments in their own networks. Local competition in high speed data services can develop the same way, but CLECs must have the same opportunities provided to the original long distance competitors.

Furthermore, section 4(b) could have an extremely harmful effect on competition for voice services as well as data services. This is because section 4(b) exempts the ILECs from providing the network elements used to provide high-speed data services. Network elements are often facilities (i.e. the loop and trunk) that are used for both voice and data services. It is impossible to distinguish between voice and data traffic, since they are both increasingly transmitted in digital form that consists of "ones" and "zeros." Almost every CLEC provides both voice and data services to their customers over the same facilities. If the CLEC cannot obtain a network element because that network element is used for data service, the inability to obtain that network element is almost certain to limit the CLEC's ability to provide voice services as well.

H.R. 1542 also places severe limitations on the "line-sharing" rules adapted by the FCC pursuant to section 251 of the 1996 Act. "Line-sharing" is the unbundling of the high frequency portion of the local loop used to provide high speed data service. CLECs lease this portion of the loop to provide digital subscriber line ("DSL") service to customers in competition with the ILECs. Line-sharing makes it much more convenient and much more economical for residential customers to get DSL. The FCC ordered the ILECs to allow competitors to line-share in November 1999. Since that time, residential DSL competition has exploded, with both the ILECs and competitors providing line-shared DSL.

To the extent that the lines between people's homes and the ILECs' central offices are all copper, competitors can access the high frequency portion of the loop at the central office. Recently, ILECs have begun to replace some of the copper lines with fiber-optic lines.[12] The lines that are closest to people's homes are still made of copper. The place where the fiber ends and the copper begins is referred to as a "remote terminal."[13]

When fiber is "pushed out" to remote terminals in neighborhoods, competitors must be able to locate their own DSL equipment in the remote terminals in order to provide DSL service, or they must be able to get access to their subscribers' data traffic in the central office. The FCC and several States have ruled that competitors must [75] have access to remote terminals in order to continue to provide their DSL service.

---

[12] This yields benefits for consumers (faster, more available DSL service) and for the phone company (lower maintenance costs).

[13] The remote terminal is a piece of equipment that multiplexes the signals from several copper loops onto the fiber optic line. Currently, 35% of American homes are served by remote terminals with a mixed fiber/copper architecture, and this number is expected to grow rapidly, as the ILECs expand their plans to upgrade their facilities.

H.R. 1542 would overturn these FCC and State decisions and make it more difficult for consumers to obtain high-speed service from competitors. H.R. 1542 would preclude line-sharing for customers that are served by hybrid copper/fiber loop facilities and remote terminals.[14] This would deny competitors the ability to serve those customers, who will remain captive to the ILECs, a monopolist provider, for voice and data service.

H.R. 1542 Preempts FCC and State Regulations that Govern the Internet

Section 4(a) of H.R. 1542 may be construed to completely deregulate high speed data services offered by the RBOCs.[15]

---

[14] Although the ILECs claim that it is technically infeasible to line-share over a mixed copper/fiber architecture, this is simply untrue. Competitors can access fiber networks by interconnecting their equipment with the ILECs' facilities in the central office where the fiber loops terminate. Competitors can also interconnect with fiber facilities at the remote terminals, where the copper lines meet up with the fiber. There are no technical impediments to these interconnections and, in fact, this is the same way that the Bells offer their own broadband services. Even Qwest Communications has recognized that competitors need access to loops in order to provide broadband service. See Comments of Qwest Communications at 3, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Second Further Notice of Proposed Rulemaking; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Fifth Notice of Proposed Rulemaking* (filed Feb. 27, 2001). And Verizon has stated that an architecture of fiber and copper could be offered to competitive carriers. See Letter from Gordon R. Evans, Vice President, Federal Regulatory Affairs, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, Apr. 26, 2001, at 2, filed May 1, 2001 in connection with *Bell Atlantic/GTE Merger Order*, CC Docket No. 98-184.

[15] Section 4(a) provides that "[e]xcept to the extent that high speed data service, Internet backbone service, and Internet access service are expressly referred to in [the Communications] Act, neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service, or to regulate any

As a result, a wide range of current consumer protection and other requirements may not apply to broadband services.[16] The Committee's narrow referral on H.R. 1542 prevented us from addressing our concerns in two areas that fall squarely within the Committee's jurisdiction: "spamming" and the Communications Assistance for Law Enforcement Act ("CALEA").

Unsolicited commercial electronic mail, or "spam," can impose significant economic burdens on Internet access services, businesses, and other recipients because of the finite volume of email that recipients can handle. This issue has recently been addressed by the Judiciary Committee. On May 23, 2001, the Committee marked up H.R. 718, the "Unsolicited Commercial Electronic Mail Act of 2001" to regulate the distribution of unsolicited commercial electronic mail messages. Yet despite the government's interest in protecting recipients from spam, section 4(a) of H.R. 1542 may severely restrict Federal efforts to regulate spam transmitted using the RBOCs' high speed data services.

Similarly, Congress enacted CALEA in 1994 to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. Section 4 of H.R. 1542 [76] deregulates technologies that are used to provide high speed data services. These are the very technologies that Congress and this Committee intended CALEA to cover. Section 4 threatens the government's authority to implement and enforce CALEA, and therefore, also threatens the ability of law enforcement offi-

---

network element to the extent it is used in the provision of any such service."

[16] These include subscriber privacy, foreign government ownership of telecommunications facilities, "slamming," obscene or harassing telephone calls, and services for hearing-impaired and speech-impaired individuals.

cials to conduct electronic surveillance of communications transmitted using high speed data services.

CONCLUSION

Competition should be our credo in telecommunications. It is the touchstone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up. And historically, it has been the role of this Committee to preserve those basic rules of competition. Unfortunately, the limited referral given to the Committee prevented us from amending or improving section 4 of H.R. 1542, which raises serious antitrust concerns that in any other context would be within the Committee's jurisdiction and will be in the future.

JOHN CONYERS, JR.
CHRIS CANNON
JERROLD NADLER
DARRELL E. ISSA

* * * * *

EXHIBIT C

Chris Nolter

Taking the Local

The Deal, June 2, 2003, at 22

Former broadband provider Broadwing Inc. last week reverted to its previous name, Cincinnati Bell Inc. While that may be the most visible change at the company, the telecom has undertaken a complex restructuring in the last six months.

Broadwing embarked on the effort in late October, a month after CEO Kevin Mooney's appointment.

"There were two issues," Mooney explains. "There was strategic overhang from being in the broadband business, and there was also financial overhang."

The first step was to renegotiate the 2003 and 2004 credit facility payment schedules. To get the lenders to give some ground, Broadwing agreed to a higher interest rate and a prepayment. Goldman, Sachs & Co.'s merchant banking unit arranged a $350 million issue of notes to help the company raise funds; the firm holds $250 million of the notes.

"If you looked underneath it all, this is a terrific company. It's very profitable. It has terrific management," says Muneer Satter, a managing director in Goldman's merchant banking group. "From that perspective it was a relatively easy decision to make. The issue was really getting the bank debt refinanced and getting the company on firmer ground."

Broadwing is also selling the assets of its cash-burning Broadwing Communications Services broadband unit to the buyout vehicle CIII Communications LLC for $129 million in cash. Announced in February, the deal is expected to close early in the third quarter.

Unlike some recent telecom transactions, the broadband sale wasn't routed through bankruptcy court, though Broadwing did consider putting the unit into Chapter 11. The company took the precaution of obtaining a waiver from Oak Hill Capital Partners LP, which has debt that could have been accelerated by a subsidiary filing.

Broadwing didn't file the subsidiary in part because it didn't want to tarnish its money-making local and wireless businesses. The company also wanted to preserve its right to apply $2.1 billion in net operating losses to future taxes, which could result in more that $800 million in tax savings over the next eight to nine years.

To facilitate the asset sale, the telecom also exchanged two series of notes that were issued by the subsidiary's predecessor, IXC Communications Inc., before its $3.2 billion merger with Cincinnati Bell in 1999.

"I don't know how we could have made it more complicated," Mooney says of the many interlocking negotiations.

Lehman Brothers Inc. and Banc of America Securities LLC have advised Broadwing, with Lehman leading the sale and BOA heading the bank amendment.

"I think it's going better than expected," Cannon Carr of CISC World Markets Corp. says of Broadwing's restructuring, though he notes the company still has a funding gap in 2006.

Carr and others have suggested that Broadwing could sell its wireless business. The company plans to address the 2006 obligations through its cash flow and another trip to the capital markets.

"To the degree they can generate $200 million a year in free cash flow, if they can do that, by 2006 they'll be in pretty good position," observes Will Power of Robert W. Baird & Co.

"We've got three full years to refinance $800 million of a $2.5 billion debt structure," Mooney says. "That is not at all an overwhelming task."

The Broadwing chief recently told The Deal's Chris Nolter more about the company's plans.

The Deal: One of the next milestones in the restructuring is the closing of the broadband sale. When will that happen?

Kevin Mooney: We have been saying the M&A deal will close in the third quarter. It could be earlier.

We have to get each state to approve the license transfer and the business transfer. There are 47 states. They are perfunctory filings, but there's a lot of bureaucracy involved.

What additional steps do you see taking?

Two steps. We believe that we can generate somewhere in the neighborhood of $200 million to $250 million free cash flow per year for debt reduction. We've been saying north of $200 million.

Every time we have an earnings release, we show the total cash flow. The total company is cash-flow positive. We show what the [cash] use was in the broadband business and then what the continuing business' positive cash flow was. We've been doing about $65 million to $70 million a quarter.

Once we put the new credit facility in place, the interest rate goes up. That's why we're in the $200 million-plus range.

We'll also be in the capital markets long before 2006 for the sole purpose of retiring the credit facility.

The credit facility is still a larger portion of our capital structure than we would like. We will probably be in either the high-yield market or the convert market within the next 12 months in a substantial way to start taking a big bite out of that 2006 refinancing.

How receptive are the capital markets?

I can only tell you that I believe we have access to the high-yield market today. The market is fairly strong. Liquidity is returning. There have been a number of deals that have been priced in the neighborhood that we would find acceptable in related industries. I don't think anything is imminent. I'd like to finish our restructuring before we get back into the capital markets.

The investment banks are calling constantly when anything prices. There have been a couple of pricings of high yield issuances that are not in our industry and a few that have been. There have been a number of converts. The convertible market is red hot right now.

There had been speculation that you might also sell the wireless unit.

Factually, first, we don't have to sell that. We don't have to make any more dispositions once we dispose of the Broadwing Communications business. It really becomes elective on our part if someone is willing to pay what we consider good value for our shareholders. I don't see that happening in this market today.

We have a 20% partner in AT&T Wireless and they do a right of first refusal on any transaction. My view right now is we're doing great with what we have.

So you are not shopping wireless?

We are not. It is certainly not needed.

For a long time there has been talk about the need for telecom consolidation, both in long haul and wireless. What's the outlook from your perspective?

In the long haul, I would start off by saying I don't see anyone entering that business who isn't in it today.

I just feel that the [incumbent local exchange carriers] don't believe they have to buy it, that they can win it in the marketplace.

I also feel that they don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that.

I think they feel that they have won the battle. They have beaten back the [competitive local exchange carriers]. They have beaten [interexchange carriers, or long-distance companies]. Why would they want to start a cross-border battle?

Within the industry, I see the consolidation happening in the second tier, like Level 3's acquisition of Genuity.

There was some stuff [said because] Broadwing Communications was bought by a new entry. Many people in the industry were disappointed by that because they wanted one less network out there.

What's holding up deals?

Truthfully, the synergies are there. If someone in the network business buys another network, they can have very good economies of scale running just one combined network. They only need one set of assets, one set of support staff, one sales channel, one management channel, one network operations channel.

The problem is they don't have any access to capital to effect a transaction. That's one of the biggest issues to date. In the long-haul market, there is just a very limited amount of capital available.

They could do stock. I don't know that the sellers really find the currency acceptable.

I don't see long haul consolidating soon. I think it's more likely in the wireless space.

Some people think the first wireless deal might be better for the industry than the parties involved. When do you see wireless consolidation happening?

I honestly thought we would have seen it already, and that it hasn't happened makes me cautious about when it will happen.

I don't see anybody taking it on the chin for the industry. In the Sarbanes-Oxley world, they're going to have to be motivated by what's best for their shareholder base first. Maybe those two intersect and they're one and the same. When it happens, I don't see big premiums, either.

What is the impact of all the Chapter 11 restructurings we've seen in telecom?

It keeps another competitor alive longer. I think that's what it does. The financial markets have written the assets down almost to zero to begin with. So from a stock valuation point, it's not like the long-haul networks have a lot of value.

The only question is, Do these reconstituted companies act rationally or not in the marketplace?

I have the sense that there is more likelihood that they will act rationally than not. The frothy valuations of the equity markets that caused people to do crazy things like swaps and price cuts to get market share – that payoff just isn't there.

When you come out of bankruptcy, typically you're more hindered that when you went in. CLECs are a great example of that.

The company considered a Chapter 11 filing for the broadband unit but didn't go that route.

We prefer to continue the option we have. It clearly gives us ownership of the NOLs, where there's some risk that bankruptcy might cloud that.

We have a very solid, stable [local exchange carrier] and wireless business. We don't want to damage the value of those businesses, and at the same time that $2.1 billion in NOLs is a very valuable asset. The reason they have value is that our profitable business can use them.

How did the Goldman notes fit into the overall reconstructing?

This was critical. The banks already had a very senior position in the capital structure. We knew that we needed to negotiate an extension of maturities in 2003 and 2004 with the banks.

Clearly yield alone wasn't going to get it done, so we had to offer a prepayment as well. To source that prepayment we needed some capital at a time when the capital markets were absolutely closed, especially to telecoms.

Goldman saw the value of the local franchise and the continuing business. It could see through the restructuring and so they made an offer that they would put in $350 million, the majority of which is their own money. It was contingent on getting the bank amendment completed. We brought that money in and that was really the first [step] that could facilitate our entire restructuring. That closed in March.

When you look at the Broadwing restructuring in the big picture, what is your debt-in-Ebitda target?

We will be at $2.5 billion in debt and $500 million in Ebitda. Five is where we will come out. We would like to retire $200 million to $250 million in debt a year for the next several years.

With some growth in Ebitda and the reduction of debt, we get down into that 4 range pretty darn quickly, which means improving credit quality. Two years from when we close, we'll be in the 4 range. I expect to close in the third quarter.

The local businesses are generating north of $200 million free cash flow already. This will not require unforeseen growth; this is business as usual. It is separating the cash-consuming business from the cash-producing business.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY,
Plaintiff,

v.

BELL ATLANTIC CORPORATION, ET AL.,
Defendants.

New York, N.Y.
August 1, 2003
2:30pm

Before:

HON. GERLAND E. LYNCH, District Judge

APPEARANCES

MILBERG, WEISS, BERSHAD, HYNES & LERACH, L.L.P.
Attorneys for plaintiff
BY: J. DOUGLAS RICHARDS
MICHAEL BUCHMAN

KIRKLAND & ELLIS
Attorneys for defendant
BY: STEVEN G. BRADBURY

MAYER, BROWN, ROWE & MAW
Attorneys for defendant
BY: HECTOR GONZALES
RICHARD J. FAVRETTO

KELLOGG, HUBER, HANSEN, TODD & EVANS, PLLC
Attorneys for defendant
BY: MICHAEL K. KELLOGG
MARK HANSEN

[2]

PILLSBURY WINTHROP LLP
Attorneys for defendant
BY: MARIA T. GALENO

WILMER CUTLER & PICKERING
Attorneys for defendant
BY: PETER VIGELAND
WILLIAM KOLASKY
ANJAN SAHNI

[3]

(Case called)

THE COURT: This is all very exciting. Generally when I have oral argument on motions I spend most of the time on the questions that I have, and it may be that the parties have come with presentations to make just like they do in the Court of Appeals, with real lawyers and real judges. I am happy to do that, although if we are going to have some formal presentations, maybe I should have some idea how long people intend to speak and who intends to speak, just so that we can keep some control over the proceedings. Mr. Hansen?

MR. HANSEN: Good afternoon, your Honor. Mark Hansen for SBC, and I will be speaking on the motion. We have no presentation.

MR. RICHARDS: I will be addressing the joint motion of the defendants. My partner Mr. Buchman will address the personal jurisdiction motion of Bell South.

It is my habit to come with a presentation, but I always believe I should answer the court's questions first, so I am happy to start there.

THE COURT: Maybe I will start, since it is the defendants' motion, by hearing from Mr. Hansen briefly and raising some of the issues that I had.

MR. HANSEN: Thank you, your Honor. For us, we believe the motion is a fairly simple proposition. It has two legs. We believe the conspiracy count doesn't state a [4] conspiracy claim and the filed rate doctrine precludes plaintiffs' claims. On the conspiracy, I would like to read the allegation so it is clear. It is paragraph 451 of the amended complaint. It says, in the absence of any meaningful competition between RBOC in one another's markets and in light of the parallel course of conduct that each engaged in to prevent competition from the local exchange carriers within their respective local telephone and/or high-speed Internet services markets and the other facts and circumstances alleged above, plaintiffs allege upon information and belief that defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed Internet services markets and have agreed not to compete with one another and otherwise allocate customers' markets to one another's.

That's it. We have no direct allegation of what human beings ever met. This happened in 1996 when there were seven of us. No allegation of when people met, no allegation of what they agreed upon, if anything, no allegation of a mechanism. We are left with a classic bare-bones allegation of conspiracy which the Second Circuit in the Heart Disease Research Foundation concluded is a purely dismissable conclusory allegation of conspiracy. In Heart Disease Research, Judge Feinberg was faced with a conspiracy that said American Motors, General Motors, Ford and GM all conspired to prevent the [5] development of a non-polluting car and the courts court [*sic*] said that doesn't state a claim, goodbye.

We think that is the case here, your Honor, and we think it is simple as that. In fairness, as a direct allegation it is as

simple as that, but we do have to move on to the second part of the argument.

THE COURT: Before we get there, this is the kind of argument that I always have trouble getting a handle on, because on the one hand we have the general principle that the Swerkowitz case is in my view just a continuation of a long-standing principle. I don't think it changes the law, I think it's what it always was, that we have notice pleading, and maybe footnoting to that also that it's very unlikely that plaintiffs in cases like this ever are able to allege when and where and how the meetings took place that may have formed an agreement in secret.

So that, you know, the argument that plaintiffs have to give that kind of chapter and verse seems to fly in the face of the general rule that plaintiffs don't have to plead their evidence or all of the facts that give rise to the claim.

Set against that, it is of course very easy to make charges in that very general form, and one is of course sympathetic – and I think this is where the decisions that you cite draw their power. One is sympathetic to the idea that defendants shouldn't be dragged into court simply by somebody [6] saying something in order to generate a fishing expedition, to check it out and see whether it might turn out to be true or not. Where does one draw the line in this regard?

You know, a lot of the things that you say in your brief suggest that, well, they don't tell us where the meeting was and they don't set out a whole microeconomic theory as to why this, that and the other thing might be true. That is the sort of thing that you don't see in complaints of any kind. That would be evidentiary matter. So what is it that you can say?

MR. HANSEN: Your Honor, I think you are right, Swerkowitz does not state law. Nonetheless, the law is that you have a short statement of facts entitling you to relief. That Verizon and Bellsouth entered into a conspiracy is a conclusion of law, not a statement of fact.

THE COURT: It is a conclusion of fact, isn't it? I see every day young people who are less exalted than your clients called into court because the government says that they conspired to deal in narcotics. You can have a whole trial, and at the end of the trial we still don't know when, where or whether they ever sat down and made some agreement. We have a lot of facts that show that people are connected to each other and a particular bad outcome, and we let the jury decide whether they are guilty or not. Nobody is ever called to the level of detail of pleading that you are suggesting.

[7] MR. HANSEN: Your Honor, I wouldn't want to digress into the pleading rules for a criminal case, the bill of particulars and the role that plays. I would note in civil cases, based on Rule 8 and 12, and the substantive rules of the antitrust laws and I think it is reasonably well stated in the Hartford and Swerkowitz case, the fact that people conspired, that is not a statement of facts, it is a legal conclusion. On the other hand, evidence does not need to be pleaded. So if the plaintiff has a basis for alleging that on a particular date at a particular place particular individuals agreed among themselves to divide the their [*sic*] markets, that would be a basis to move forward on a conspiracy claim.

Your Honor, of course it is true that people always make the argument, how do we know unless we get into people's – I don't mean to be flip. That is the last refuge of a pleading scoundrel. They can't come and say I've got a suspicion, let me root around in files and I may have something.

But, your Honor, the antitrust laws, not the pleading rules, have come up with standards that address the very concern that you raise, or that I believe you raise. That is this. All right, say plaintiffs don't have direct evidence of meetings and so on. Is that the only way one could state a conspiracy claim? Of course not.

I was moving to the second part of the antitrust law, [8] which says the following, and I believe this has been faithfully followed by the Second Circuit as recently as a few

weeks ago. If the plaintiff is in possession of facts that permit the plaintiff to allege a direct case, that is, people met and agreed, you can still base a conspiracy claim on parallel conduct by identified economic actors, but because that is such a potentially broad and sweeping rule and because parallel conduct is by itself indeed expected of economic actors, because they all have the same information and the same motives – we expect them to parallel each other – the courts have said, using the Pollit Krasner [*sic*] standard, you have facts, not speculation and not conclusions of law, that tend to show that the allegedly conspiratorial actions resulted from some sort of agreement and not merely from independent parallel conduct by firms acting in their own self-interest, quoting from Pollit Kasner [*sic*].

So let us go to the plaintiffs' complaint and see if there are facts alleged that this court, at the outset of a massive antitrust case – Associated General Contractors remains the law after Swerkowitz. Now I direct you to what they say gives them a ticket. They say it is in paragraphs 37 through 41 of their amended complaint, and I think it is very important that we hew closely to those paragraphs, because I believe I can show your Honor that even in the regime where we accept everything Swerkowitz says, there still are not facts [9] pleaded by the plaintiffs in this case that permit the inference that the entirely expected and rational conduct of our clients not to do a new business they never before have done, is entirely rational and innocent, and they don't plead any facts that would permit you to draw a contrary inference.

Without belaboring it, let's go through the paragraphs quickly.

THE COURT: Let me try and summarize it in the way that seems most appealing to me, and then maybe that will expedite the response. It seems to me that the argument is, none of these entities – and I realize there is a footnote as to whether it's none – have ever, and there is a footnote as to whether it's ever – have competed in each other's markets. If

that pattern showed up, absent the peculiar history of this industry I think one would think it a peculiar pattern indeed if you had companies in the same line of business that had regional territories, particularly if those territories didn't have some natural contiguous quality to it but you have people sort of checkerboarding the country, and they never move next door to move into each other's territory. I think that would be a very suspicious situation.

In this instance, there is a historical explanation for how these people came to be in these regions, which I accept.

The question then is, isn't it ultimately a question [10] of fact how suspicious it is after how many years that something that the Congress apparently expected would turn into the kind of normal competitive market where it would be suspicious if everybody was not competing or competing only in their own little spots, how long does it have to be before you say, you know, that's suspicious again because why aren't these people doing what Congress expected? Is seven years too little? Or can't the plaintiffs draw an inference that Congress intended to turn this into a market like any other, and Congress expected that there were economic incentives that would lead people to engage in this kind of competition, and lo and behold we are not seeing it. Why can't they rely on that? If it is still the same in 10 years would they have a claim? Certainly they wouldn't have a claim.

MR. HANSEN: I am not sure Congress's expectations play a role in this. I think the lens we have to look at here is from the standpoint of the defendants. You have to look at it and there has to be some plus that makes an inference that there is something strange here.

Again, I don't want to fall into the trap of a summary judgment. The pleaded facts establish the following. These companies were created for limited regional markets, to provide local service in those markets. They were only created in 1983. Thereafter, through acquisitions, we see the checkerboard on some of the maps. So the question is raised, [11]

isn't it suspicious that they don't cross the border if they are so close. I grant you, that is the core allegation of their complaint. Everything else, I submit, is speculation, window dressing, misquoting of people.

But to take your question, is it a plus factor that companies in adjacent markets don't jump the border, the answer is in their complaint. There are two ways, according to their complaint, that they could do that. One would be to duplicate the entire telephone infrastructure and to go into competition. Your Honor, I would submit as a matter of logic and common sense, I think everyone would agree, one isn't going to put up the logs and string the poles where the markets are losing their shirts under enormous price pressure.

Then we go to route B, the so-called '96 Act, Telecommunications Act of 1996. They say Congress created this wonderful act that says to you go out of your region and you can take advantage of this thing called unbungled [*sic*] network pricing. I don't want to fall prey to acronyms, but it –

THE COURT: Is this another way of saying they could be a CLEC and somebody else is ILEC?

MR. HANSEN: Exactly, your Honor. Here is why. Their complaint establishes not a reasonable inference, it is contrary to what they needed themselves, and it is why it hasn't happened. Unit P price is in the view of all the ILECS ruinously nuts, a confiscatory pricing model that Congress set [12] up to try and incentivize people to go into these markets. In other words, Congress said we do want to jump status competition and we will do it by requiring the ILEC, us, at near confiscatory rates. The ILEC are united in opposition to that, as any rational business person would be. The confiscation of their property in order to allow rivals to take their customers is the duty of every one of these companies. They are being asked to surrender their property at less than fair market value to allow competition as Congress wants. So they have a pleaded reason not to pursue unit P price out of the region, because it is the very same thing they are trying to kill

in the courts and have killed successfully twice. The only plausible explanation is that you would not go to seek a quick buck across the border at a time when the whole thing fuels your profit and gives it the [*sic*] rivals.

THE COURT: I don't know if this is part of your argument or not. Let me ask. Not only are the defendants fighting on the beaches and the shores to hold off or change the legal landscape, but the plaintiffs themselves allege that another branch of this conspiracy is that they are each fighting off the checks that do come along and try to take advantage of this regulatory regime, and I suppose you could say that to the extent they are successful themselves in beating down competitors who try to come into their area and operate as CLECS, they know very well what is going to confront [13] them if they go and try to do the same thing in somebody else's backyard.

MR. HANSEN: One could say that, and it leapfrogs to my second point, and that is the only way that allegation – using the appropriate Sherman Act standard –

THE COURT: CLEC is the way we pronounce it? Whatever you say.

MR. HANSEN: You're the judge and I'm not.

THE COURT: That and a dollar fifty no longer gets me on the subway.

MR. HANSEN: I probably will lapse into both, your Honor.

The point that I wish to make is, under the antitrust law, this plus factor is only a plus factor if it meets the following criteria. It has to be an action against self-interest, and it is not to pass up. In other words, the question is are you passing it up when you have no better opportunity to use that buck. No such pleading here.

Then I go to the second part of why it makes no sense, why on the face of their complaint, in addition to what you say about defending your own customers and property, which is

in every business's [*sic*] interest, you're an executive and again one of the prime purposes of our argument is that we don't want to put the courts in the position of second-guessing the executives, but thinking for a moment like an executive, you have your [14] lawyers in court knocking out these prices. They are like a sand castle. This is not a matter of expanding our business, this is a matter of becoming a re-seller in someone else's local territory, a business that we have not in any nature or scale done. So the decision to permit investment resources to go into a business, to stake capital in a business based on a pricing model that has twice been overturned and will be up for a third strike any day now is also nuts.

[15] But what I think we have to persuade you of today, your Honor, is that looking at the complaint and the facts they plead, that Mr. Notebaert said that he didn't believe it was a good idea from the standpoint of his business to go in as a CLEC, those do not permit a logical inference of conspiracy.

THE COURT: I hear what you are saying. The problem is that try as you might to put this on the basis of the plaintiffs' pleading, the real question is, is it suspicious. The real question is, is the failure to go into another area contrary to the expected economic interest of the defendants such that a reasonable inference would arise that it's strange that they don't and there must therefore be an agreement. That looks awfully like a question of fact. It is an empirical kind of question about how the business works, and I am left wondering what am I to rely on and how am I to analyze these various questions of what it really would take to move into the next door area. Do I read a book on telecommunications? Do I listen to the representations of counsel? Do people need to submit expert reports? Should the pleading contain some kind of expert analysis that explains why this is suspicious? Is that what they have to do to further their theory so that I don't have to rely essentially on the defendants' theory of the

case, say OK, now I see, there is nothing suspicious about this at all because Mr. Hansen comes in and tells me this is what it takes to compete and it doesn't make any sense and therefore I [16] should not pay any attention to the apparently suspicious pattern?

MR. HANSEN: I believe what I am giving you is a fair reading of what is alleged.

THE COURT: They don't allege that the pricing structure that Congress imposed is nuts.

MR. HANSEN: They did, your Honor. When they cite Mr. Notebaerk's [*sic*] –

THE COURT: They say your guy said it.

MR. HANSEN: That is what they rely on. I don't want to play games, but when a pleader incorporates by reference a statement of one of our directors, that's there for you to look at. That's a fact pleaded by them.

But, your Honor, I will take a step back. I won't ask you to accept any of my inference. We will take your case head on. The mere fact of a business's failure to enter another's line of business has never, to my knowledge – we have looked pretty hard. That has never been looked at by an antitrust court as a suspicious fact itself. It is nothing but parallelism. It is a bootstrapping problem. That has too logically been explained by independent business reasons to move a conspiracy.

Your Honor, the car manufacturers and heart disease [*sic*], they weren't entering a territory. The cases that we cited, they weren't entering a territory.

[17] THE COURT: But really the key thing here is that I need to understand what competing in even the next town, let alone the next region, is not just a matter of mailing out a notice to people who live there, saying hi, you can now buy from us instead of who you are buying from, because in order to buy from us we would either have to have an elaborate infrastructure or we would have to be purchasing facilities from

our competitor in a way that for a variety of reasons wouldn't make sense to do.

MR. HANSEN: Where they say it has been made enormously difficult for CLECS to go into this business, obviously that is something we have to consider. We are nothing better than a CLEC too.

THE COURT: I understand that. I think I have the point. Do you want to talk about the filed rate thing?

MR. HANSEN: I can do it in two sentences. Paragraph 92 of their complaint says, and I am quoting here, their injury consists of paying higher prices for local telephone and/or high speed Internet services than they would have paid in the absence of the violations alleged herein. Every court in this circuit and the Supreme Court has said that that mechanism of injury is barred by the filed rate doctrine. It doesn't matter the conduct of the defendants, it doesn't matter if they are bringing a class action. This case is effectively on all fours with the fount of all filed rate cases, Keogh.

[18] THE COURT: I think I understand that. I only had one question about this, which is, do any of the cases in the filed rate area, and I certainly haven't read all of them – only hit the highlights, I guess – do any of them bar injunctive relief? Because what I am thinking is, I understand the point you are making as applied to damages, that the whole damage claimed is that the rates were high and the rates are tariff rates. But suppose they were able to establish that the CEOs of these four companies sat down together and agreed that it's better to have a little cartel and everybody stay home in their own neighborhood and they could prove that that happened. How would enjoining them not to do that again in the future trench upon anybody's regulatory scheme for setting rates, or how would it have any discriminatory effect at all that would be inconsistent with the rate structure?

MR. HANSEN: It wouldn't, your Honor. However, I don't want to be too broad. Injunctive relief that would change the tariffs would be prohibitive. But an injunction to

restrain conspiratorial agreement would not and the Supreme Court has so suggested.

That said, your Honor, going to the practical consequences of that point, we still have this complaint needing to be dismissed because we can't tell whether they have ever bought a nontariff service. The court would do great service to everyone in dismissing this. If you seek relief in [19] the form of injunctive relief, that does not change the conditions of the tariffs.

THE COURT: I think I understand the position better now. Thank you. Let me hear from plaintiffs.

MR. RICHARDS: Doug Richards from Milberg Weiss for the plaintiffs.

Would your Honor like to deal with questions or should I go right into the presentation?

THE COURT: I am happy to hear the presentation and ask questions afterwards, unless something comes up during.

MR. RICHARDS: I have hard copies of the images that we are putting up and the defendants have copies of these as well. So you can look at the screen and whatever is easiest.

We certainly agree with the court that the Swerkowitz case did not basically change the standard that is applicable to a pleading, but it does have some content to it that is very directly analogous to something that is going on in this case that is sort of an antitrust phenomena, which the court may or may not have familiarity with, which is the Monsanto case. There is this body of law in the antitrust world about parallel conduct and the need for an evidentiary standard when you need to prove your case by inferential case, which is based on the plus factors soft parallel conduct. That antitrust construct is summary judgment law. It is an evidentiary standard. It is almost precisely analogous to the doctrine in the employment [20] discrimination context of how you prove an inference case when you don't have direct evidence of discrimination.

THE COURT: I follow the analogy and I understand that point about how parallel conduct and plus factors function at the level of fact finding, but Mr. Hansen's argument – and I am not sure that I found any case other than the Heart Disease Research – that's the only one he referred to – on an appellate level, but there are district court cases that go that way – says something at a minimum like this, that you can't embark on discovery and an [*sic*] potential industry restructuring project simply by saying there is a conspiracy there, now we've pled it, and even saying exactly what the conspiracy is, because I think you tell us what the conspiracy alleged is. It's an agreement to divide markets that I think would clearly be a violation of the antitrust laws – no one is telling me it wouldn't be – if people actually did get together and make that agreement. But I think he is citing at least one binding authority and a bunch of district court decisions that seem to say that isn't enough somehow, not because there is a Rule 9 issue but just because it's too easy – they have to give something more. I am not sure what that is and how you tell when you cross that line, but isn't there something at the pleading, law at the pleading level that is separate from all the summary judgment cases?

I fully appreciate and agree with what you say about [21] how some of the stuff they cite is in summary judgment cases and the business about the plus factors really goes all the way back to the movie theater cases and all that other stuff, and that's all about substantive law and not about the pleading. But there is authority out there that says you can't just say a conspiracy.

MR. RICHARDS: There is, your Honor, and that is really the subject of slide 1 of our presentation. I don't mean to say there is nothing like that, there are cases like that. When these cases say when you really deal with nothing but a bare bones allegation of conspiracy, you are dealing with situations where you don't even fully understand what the conspiracy is. Think of a three-page complaint that says the de-

fendants conspired against me to hurt me. period, end. It doesn't explain the market, doesn't explain the context – provides nothing so you can even make sense of it. That is not sufficient to withstand a motion to dismiss. We don't quarrel with that. This complaint is a far cry from anything like that. But that is basically what this law is dealing with.

The defendants have sent a copy of Judge Pauley's recent decision to the court. It is actually a very nice illustration of where a court can kind of go wrong. In that case the court cites Ambuk, a summary judgment opinion. It is a Second Circuit summary judgment case for the proposition that you have to allege a factual circumstance to allege antitrust [22] conspiracy. So it is sort of like this sort of inferential case stuff. There is no Second Circuit case that has ever – and we have said this in our brief and they haven't identified any that does. There is no Second Circuit case that has ever applied Monsanto, excluding the possibility of independent action rationale, as a basis for rejecting a complaint. There are cases like this case where a court says, very logically, look, if there is enough pleaded in the complaint to survive even that test, then of course it survives a motion to dismiss. That's perfectly logical. It doesn't follow from that that if you don't do that you're dismissed. That is in effect what they time and time again are trying to do here. That is just not the law. It is not the law under Swerkowitz, it hasn't been the law really ever. I would submit that Swerkowitz is relevant because the Second Circuit was trying to adopt heightened pleading criteria in employment discrimination and that kind of thing, and Swerkowitz, after Leatherman, is an unambiguous statement from the Supreme Court that that is not to be done. Unless it falls within Rule 9B, this heightened pleadings standard to weed out cases so that you can decide whether it is a good case or a bad case are not to be done. That's what it says. Unless it's there in 9B, you can't do this. So it is relevant and it is inconsistent with some of the reasoning in some of the district court cases even in this district prior to Swerkowitz. It is certainly also completely [23] consistent with

Tommy v. Gibson and the cases from the fifties. That is basically where we say the law is.

Slide 2, if a complaint is an empty vessel, you can't identify what kind of conspiracy they are claiming in a way that makes sense, of course you can dismiss it. This complaint, just to argue the facts for a moment, is so far from that. What is alleged is a stark parallel failure of the defendants to compete with each other. Even in the summary judgment context, if the court looks at the Fructose Corn decision of the Second Circuit, even in the context of summary judgment to defendants not competing with one another when one would expect them to do that they were –

THE COURT: The question of what one would expect is the difficult issue here. You know, if I looked at the kind of map that exists here in some business that had grown up in some other way, one might say isn't it odd that people have stayed always and forever in their same territory. But of course they got these territories at a time when they were monopolies and were locally regulated and were put in those territories. So now the question becomes not this pattern couldn't have arisen by accident, we know it didn't arise by accident, but it arose legitimately, and the question is, is there some natural reason to think that by now it would have changed.

So it's not just the map as such, it is a sort of map with a time dimension to it also that we are looking at, and [24] what I hear Mr. Hansen saying – I am not sure whether this works at the pleading stage or not but it is still pretty persuasive – is, each of these companies starts out with this huge competitive advantage of having been a monopoly in its own territory. Isn't it reasonable for them each independently to decide, you know, we'd much rather still have the old regime and we are going to do everything we can to keep out competitors from our turf and to try and show the world that that's the way the system should be, and picking up, as they interpret Notebaert's comments – I don't know if it is the

right interpretation or not but it is their argument – is counterproductive not because they will come back and raid ours, it is bad because it shows Congress that this can be done and we don't want them to think this can be done. We want them to leave us the hell alone in our little fiefdoms because that was a good deal for us. Each one independently may think that and it is perfectly logical for them to stay where they are.

MR. RICHARDS: But they each have a stake in the other one's – suppose neighbors have kids cutting through their yards on the way to school. If they both work to keep the kids out of the yards, it works better to keep the kids out than if only one does.

We allege in the complaint – this is fairly brief but we get the benefit of inferences. The defendants contend CLECS are hurting them by leasing network components at below-cost [25] rates. They are saying what is happening to us is unfair, the CLEC is unfairly competitively advantaged, that's what they would do if they were competing. Yet they don't do it. That is exactly the kind of plus factor that they are claiming we have to allege, that they are acting against their individual self-interest.

THE COURT: Again, this is the debate that makes me uncomfortable at the pleading stage, but if we are able to have it, I am not sure that I am unpersuaded by the argument, because it is one thing for somebody who is looking for a toehold in this business to say here I will be a CLEC and take advantage of these alleged advantages, it is another thing for somebody who has a whole line of business that they are running to decide we can also do this other thing, which is a very different thing, isn't it? When you say it is the sale of telecommunications services, isn't it a very different thing to be this kind of reseller than it is to operate the underlying equipment?

MR. RICHARDS: It is a different thing but I think the investment necessary in order to do it is not very great.

THE COURT: Sure, but the investment isn't very great, obviously, to set up a newspaper stand on the corner. That doesn't mean Verizon would be expected to do it if it is not the line they are in and not something they are very good at and not where they want to spend their money.

[26] MR. RICHARDS: If you look at Judge Pauley's decision, one of the opinions it cites, NASDAQ, it says it is unnecessary for plaintiffs to plead the basis upon which the combination will be proven. The goals of efficient judicial administration are retarded, not advanced, when the pleadings are used as a battleground without the necessary development on which to focus a decision.

I can't say it any better than that. This back and forth debate without a factual record on the basis of a complaint which is supposed to only have to state a short and simple claim under Rule A is just not appropriate. It mires us as it does now in elaborate, Byzantine early debate unrooted in facts. It is not appropriate and not where we should be in a motion to dismiss. To the extent that is their argument, and it is, the motion should be denied.

THE COURT: I hear what you are saying. I will be much better off after I hear the parties' hired economists making the same arguments you are making now, but with charts and graphs.

MR. RICHARDS: One also doesn't have to be an economist to look at a map like this one and see these little areas completely surrounded by the territory of one or another island, tiny islands in the stream where people are the incumbents, where they are not advertising. Take this area in Florida. They are advertising all around for this type of [27] service and people all over are getting the ads on television, just to try to become the dominant player in the CLEC, and they are not doing it. Who needs an economist? Does that mean that they can't bring an economist in who can try and argue that is their reason? They can put in evidence.

THE COURT: I am glad defendants have that right. But look at Florida there. It looks like Tampa is kind of excluded from Verizon's little island. Someplace on the West Coast there is a little bit of gray surrounded by red.

MR. RICHARDS: Yes, entirely surrounded. A lot of these sort of odd areas, as I understand it, are a legacy of the action of GTE. But the fact that that would stay the state of play without restructuring to deal with economic realities is extremely suspicious.

THE COURT: Well, it would be very suspicious if what we were talking about was a catalog mailer who chooses to mail to all the zip codes except Tampa central, and all it would take is throwing a few more into the mails and they could complete [*sic*] in that area, too. Then you would have to wonder why they are doing that. But Mr. Hansen says in order to pick off that gray area, it is not just a matter of including in their TV ads and now we serve Tampa too. They would either have to build a network in Tampa – that is not really your argument. Your argument is that they go into Tampa as a CLEC. That means they will have to get whichever of the defendants is the ILEC [28] in that zone and purchase block services from them and then market that in some way to the people there, and I guess the question is how the hell do I know whether that would make sense for them to do or not without a factual record.

MR. RICHARDS: The court can take notice that there are lots of CLECS who have been stymied in their efforts, trying to do it, and brought many lawsuits against these defendants.

There are others who have invested –

THE COURT: Wait a minute. I thought this was CLEC. A minute ago it was just a matter of flick your fingers and you could be in that area and it was Mr. Hansen saying it would cost billions of dollars. Here you say any idiot can do it.

MR. RICHARDS: We have in our brief statements in Congress to the effect that people who have tried to do this have spent many tens of billions of dollars and that money has gone up in smoke. So the idea that this doesn't make any sense as a business model is crazy. It doesn't make sense to these defendants to let it happen, but it makes sense to do it. They don't want to do it and they don't want to let anyone else do it. If that isn't a motive and the basis for a plausible conspiracy, I can't imagine what could be.

THE COURT: I guess I am still wondering why, assuming that it makes perfect sense for, I don't know, Verizon in New York to do anything it can to keep out a CLEC, why do they care [29] if QWest does the same thing in, wherever they are, Montana? Why does it advantage Verizon in beating off its CLEC competitors to have other people be successful too?

MR. RICHARDS: One example is a point that the court made a little earlier, which is, if one sees that it happens in one place, one is going to believe that it happens in another place. They all benefit, that's right, because then they are in a position to say it just doesn't work. But if one of them didn't participate in the conspiracy as alleged, let it all happen, let the CLEC happen –

THE COURT: But then yes, I suppose if everybody else does it – it being fight off the incursions of CLEC – if everybody else does it too, that is good for me, as one of the ILEC. But I can pretty much count on the fact that they are going to do it to [*sic*] too, because it is natural for anybody that has their monopoly to want to fight off competitors. I see no reason that I have to call up the president of QWest and say hey, you know, you better keep these CLECS out of your territories. It seems the most natural thing in the world.

MR. RICHARDS: The moss [*sic*] natural thing would be for them to try to exploit the business opportunities that exist in the other ILEC territories as Congress envisioned and as was expected. How is it reasonable to give the defendants the benefit of a sort of inference that Congress was out of its

mind? I think it is entirely turning pleading standards on [30] their head, but that is the way defendants are using to approach a motion to dismiss.

THE COURT: And I suppose their protection against spelling [*sic*] millions of dollars on discovery and having it turn out that there was no real evidence is Rule 11. So long as you are comfortable that you've got enough evidence to get by Rule 11, the notice pleading system works.

MR. RICHARDS: That is some comfort but ultimately there is no way of protecting plaintiffs from a danger that plaintiffs could ever be wrong in a case. The way it was decided this would work is that plaintiffs would get the benefit of discovery and cases that have no substantive merits would be pleaded out by summary judgment. It is just law, and in effect that's the opposite of what the defendants are trying to argue on their 12(b) (6) motion.

THE COURT: Let me ask you to turn to the filed rate issue for a minute. You are not telling me that I cannot apply the filed rate doctrine, whatever it is, to this case, are you?

MR. RICHARDS: I absolutely am. I am saying that the filed rate doctrine has absolutely no application to this case.

THE COURT: I should have stated the question differently. You are not telling me that I can disregard the filed rate doctrine or tell me that it has been superseded by events.

MR. RICHARDS: No.

* * * * *